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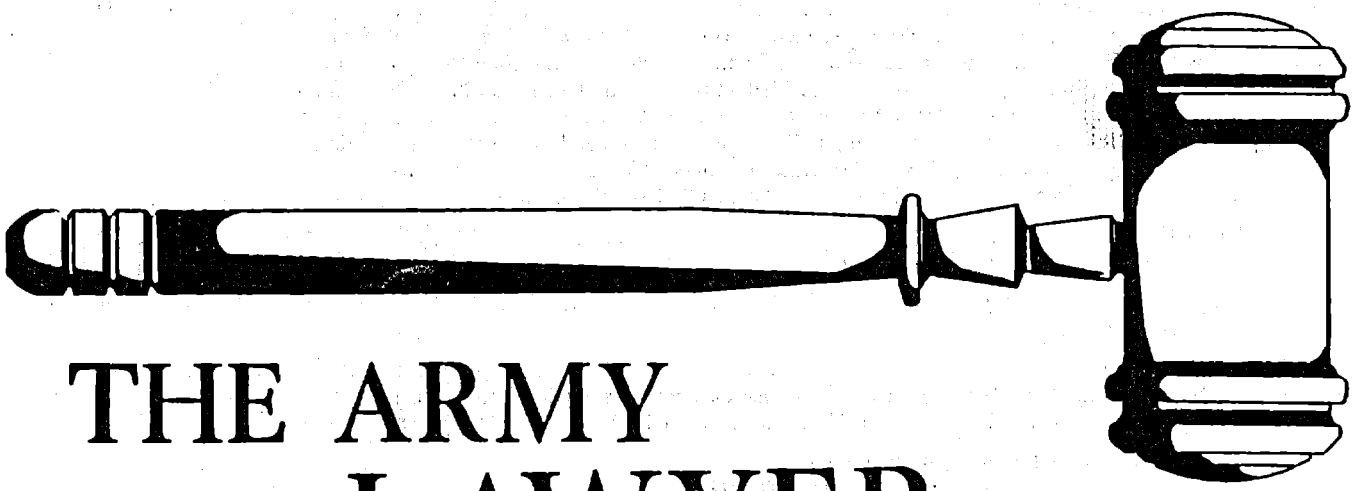

THE ARMY LAWYER

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Editor
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Special Interest Items for Article 6 Inspections

1. General Areas for Inquiry

a. What is the office appearance and morale? Are facilities adequate?

b. What are the relations with commander(s) and staff and legal counterparts (if any), higher headquarters (incl OTJAG) and subordinate commands?

c. What are office objectives for coming 12 months and accomplishments during last year?

d. Personnel status (officer, civilian, enlisted): authorizations filled? Critical losses identified to PP&TO or other appropriate office?

e. Do attorneys and other personnel understand the rules concerning relations with the media?

f. What are the positive and negative trends in functional areas?

g. Is the office engaged in any non-legal missions? If so, what are they and who directed JAG participation?

h. Does the office have a plan for professional development of all personnel? Is budget consideration given for personnel to attend career enhancing conferences or training?

i. Status of relations with local officials, including the local bar?

j. Condition of library and library holdings? Are excess ALLS-purchased library materials identified and reported to ALLS?

k. Is the office doing something new and innovative in support of the Family Action Plan?

l. Does the office have a current, functional SOP?

m. Does the office have a plan for premobilization legal counseling?

n. What provision has the office made for mobilization and deployment plans pertaining to Reserve Component elements?

o. Does the office or the command have a Defense Technical Information Center account?

p. Enlisted Considerations.

(1) Who manages local assignments—AG or SJA?

(2) Is there a sponsorship program for incoming personnel?

(3) Are there shortages? If so, why?

(4) Are enlisted personnel being cross-trained?

(5) Is there a SQT training program for legal specialists and court reporters?

q. What are office policies for sponsoring and developing summer interns?

r. Has the office been tasked by the MACOM or installation to provide input on actions which may impact upon JAGC force structure manpower such as officer and warrant officer scrubs?

s. Are there automated packages in any or all functional areas to share with TJAGSA for possible incorporation into an expanded LAAWS STAMMIS?

t. Are subordinates encouraged to write for publication? Results?

2. Introductory Program for Newly Assigned Attorneys

a. Is there an effective sponsorship program for incoming personnel?

b. Does office have an orientation program?

c. Do new attorneys spend time with troop units?

3. Physical Fitness and Weight Control

a. Does office have a regular PT program?

b. Have personnel over 40 been medically screened?

c. When was last APRT? Did all personnel participate?

d. Are overweight personnel in a medically supervised weight control program?

e. Are personnel professional in appearance? Uniform? Grooming?

4. Legal Assistance

a. Is there an aggressive preventive law program?

b. Are offices attractive and professional? Sufficient privacy?

c. Are experienced attorneys assigned? Are any members of local bar?

d. How does a senior attorney determine client satisfaction?

e. Are legal services publicized?

f. Are soldiers getting legal assistance for OER/EER appeals? Is there any significant manpower impact from this requirement?

g. How does the office handle circumstances in which both spouses seek representation in domestic relations matters?

h. Army Tax Assistance Program. What is being done to improve tax assistance for soldiers? Are legal specialists being used where appropriate?

i. What is the waiting time for an appointment? For a will, separation agreement, or power of attorney?

j. Is there an in-court representation program? Pro se assistance?

k. How has the office been innovative?

l. How do attorneys interact with local civilian organizations?

5. Claims (AR 27–20; Policy Letters 86–10 and 87–2)

a. Are experienced attorneys assigned as claims judge advocates? How long are they stabilized in a claims assignment?

b. Does the claims office staffing indicate requisite support of claims mission? Are claims personnel sufficiently trained? Which, if any, have attended USARCS-sponsored workshops?

*c. Are adequate funds provided for: TDY for investigations and negotiations with civilian attorneys; expert opinions; and reference materials on local laws and verdicts?

*d. Are senior leaders familiar with and taking a personal interest in the automation effort of the claims office? Is the software working well?

e. Is there a mechanism in effect to ensure prompt reporting and investigation of all potential claims incidents within the assigned area of responsibility?

f. Are judge advocates or claims attorneys personally investigating actual or potential tort claims over $25,000? Is USARCS immediately notified of all claims over $15,000? Is there continuing coordination with USARCS on these claims?

g. What is the relationship with the MEDDAC? Is the legal office involved in the Risk Management Program? Is there an MOU with the MEDDAC?

h. Has the Area Claims Office (ACO) established liaison with claims processing offices? Are claims processing offices forwarding files to the ACO for action?

i. How much was recovered in medical care recovery and property damage claims last year? Is an attorney assigned to and actively managing the recovery program?

j. Are demands on carriers dispatched to carriers or USARCS (for authorized recovery) promptly? Is there a backlog of carrier recovery files?

k. Are small claims procedures being used?

l. What is average processing time for payment of personnel claims?

6. Labor Counselor Program (Policy Letter 85–3)

a. Is the labor counselor position occupied by an experienced judge advocate or civilian attorney?

*b. Has the labor counselor had sufficient training? Has the labor counselor attended TJAGSA CLE instruction in the area?

*c. Are library assets adequate? Do they include both MSPB and FLRA materials?

*d. How long do attorneys remain in the position before being rotated to another position?

*e. Does the labor counselor's supervisor have experience or training in the area? Does the supervisor actively supervise the labor counselor's activities?

*f. Do the labor counselor and supervisors have a close working relationship with the Civilian Personnel Officer? With the Equal Employment Opportunity Officer? Is the labor counselor involved at every significant state of adverse actions, EEO complaints, and labor relations actions?

7. DA Mandated Training

a. Do personnel participate in required training such as physical training, weapons qualification, common task training and NBC training?

b. Are military judges and TDS personnel invited to participate? Do they?

8. Terrorist Threat Training (Policy Letter 85–5)

a. Are personnel properly trained in legal aspects of countering terrorist threats?

*b. As a minimum, do all personnel have a working knowledge of AR 525–13, TC 19–16, and the MOU between DOD, DOJ, and FBI on use of Federal military force in domestic terrorist incidents?

*c. Is a lawyer on the Crisis Management Team (AR 525–13)?

d. Are rules on the use of force reviewed by an attorney?

9. Reserve Judge Advocate Training (Policy Memo 87–6)

a. Does the office train JAGSO units? If so, what training schedule is used?

b. Are IMA's assigned to the office? Are there vacancies? What management plan is used to schedule ADT, keep the IMA's informed of office developments, and assist them in getting required retirement points?

c. What kind of working relationship exists with the appropriate Army SJA?

d. Does the office participate in On-Site Reserve instruction?

10. Recruiting for the Reserve Components (Policy Memo 88–4)

a. Is there a program to identify quality legal specialists and court reporters for service with the Reserve Components?

*b. Is information about these soldiers being forwarded to the CONUSA SGM?

c. Are quality judge advocates and legal MOS enlisted soldiers encouraged to join a Reserve Component? Is TJAGSA Guard and Reserve Affairs Department notified when a quality judge advocate expresses an interest in joining a Reserve Component?

11. Automation (Policy Letter 85–4 and Policy Memo 88–3)

*a. What is the plan to automate office activities?

*b. Is there command support to LAAWS acquisition objectives, i.e. 1:1 PC-to-people ration (FY88) and PC networking (FY89)?

*c. Is the local DOIM providing training, maintenance, and technical support?

*d. Are LAAWS standard hardware and software products being used?

*e. What is the current automation status (20–30 min briefing by the office information management coordinator)?

12. Standards of Conduct (AR 600–50)

a. Does the office have a designated Ethics Counselor?

b. Is there an active discussion with GO and SES personnel concerning their SF 278's?

c. Are the 278's reviewed with each GO or SES at the time they are first assigned to the command or assume a new duty position in the command?

d. Is there an active standards of conduct training program?

*e. Are the supervisor and Ethics Counselor familiar with the filing requirements for 278's, 1357's, 1555's and 1787's?

f. Do senior attorneys have a firm grasp on the proper approach to take if local senior personnel (including the CG) are alleged to have committed violations of the standards of conduct?

*g. Are senior attorneys and Ethics Counselors familiar with the post-employment restrictions? Is there a program to brief those leaving the service about their post-employment restrictions?

13. Intelligence Oversight

a. Is there an awareness of the mission, organization, and function of intelligence units within the jurisdiction?

b. Does the office maintain a library of current intelligence directives and regulations?

*c. Is a judge advocate or civilian attorney serving as intelligence oversight advisor? Have intelligence oversight attorneys received INSCOM-sponsored training on intelligence law topics and oversight responsibilities? Do they have the necessary security clearances? Do they actually perform oversight duties?

14. Military Justice

*a. Who is responsible for training trial counsel?

*b. Does the Chief of Military Justice observe counsel in court?

*c. Do all new judge advocates have the opportunity to do trial work sometime during their tour?

*d. How do you track the time taken to process cases through the various steps between preferral or charges and mailing of the record of trial?

*e. Is there emphasis on trial tactics and legal issues or processing times?

*f. Are inexperienced counsel frequently paired with more experienced trial counsel for training purposes?

*g. Is there an SOP for handling requests for involuntary activation of reserve component soldiers for the on-call representative during nights and weekends?

h. In light of *Solorio*, are criminal investigations of crimes committed off-post in CONUS being coordinated with civilian authorities?

i. Has an active victim/witness assistance program been developed and implemented?

j. Does a mutual support agreement exist with TDS, in which responsibility for priority three duties is clearly defined?

k. What is being done to maintain relations with TDS and trial judges?

l. Is there an active military justice education program for commanders, soldiers, and civilians which emphasizes the fairness of our system?

m. Do court facilities (court room, deliberation room, witness waiting rooms, and judges' chamber) meet professional standards?

15. Trial Counsel Assistance Program

a. Are trial counsel using the services of the Trial Counsel Assistance Program?

b. Did the Chief of Military Justice attend both TCAP seminars within the region? Does each trial counsel attend at least one of these seminars?

c. Are trial counsel satisfied with the assistance rendered by the Trial Counsel Assistance Program?

d. Are trial counsel receiving TCAP memoranda and other literature? Do they have a copy of the TCAP Advocacy Deskbook? Is it used?

16. Litigation

a. What is being done to foster close relationships with U.S. Attorneys?

b. Is the office having any problems with the U.S. Attorney's office?

c. What kind of relationship does the office have with the Magistrate's Court?

d. What support is given the local hospital activity in litigation matters, medical malpractice questions, and quality assurance/risk management issues?

e. Any jurisdictional problems on post?

f. What type of contact has the office had with local authorities concerning child abuse and spouse abuse cases?

g. Is the office sensitive to the requirement for detailed, complete investigative reports in all cases in litigation (1AW AR 27–40)?

h. Does the office promote active participation of local counsel in the prosecution and resolution of cases in litigation?

i. Does the office take an active role in the disposition of administrative complaints in areas such as Civilian Personnel and Equal Employment Opportunity law?

17. Contract Law

a. What activities at the installation are facing commercial activities review? (Contracting out a major activity such as DEN may require the usual contracts lawyer to work full time on the CA project for an extended period.)

*b. Is adequate legal support available to provide the full range of acquisition legal services?

c. Has the senior legal attorney visited the contracting office? Is at least one lawyer designated and trained to provide installation contracting support? Do contracting officers know who their lawyers are? Do the contracting officers view their lawyers as part of the contracting team or merely obstacles to be overcome?

*d. Is the installation anticipating any significant procurement of ADP equipment within the coming year? ADP protests are common and successful protesters may collect fees. What are the review procedures?

e. How is the Acquisition Law Specialty program viewed? What interest is expressed in the specialty? Do senior attorneys understand and support the program?

f. Is the senior attorney involved in acquisition issues?

g. How closely does the senior attorney monitor acquisition law advice?

h. Has the acquisition portion of the mobilization plan been reviewed?

i. What acquisition law advice is planned for predeployment and deployment?

j. What training by members of the office has been given (is planned) for members of the command concerning irregular acquisitions and fiscal law matters?

k. How many contracts, and what percentage of annual contract dollars, were awarded during the last quarter of the fiscal year? Could any have been awarded earlier with advance planning?

*l. How many bid protests were filed during the past quarter and past fiscal year? How many were sustained? What issues were involved and what remedial measures were taken?

*m. How many contract claims were filed with contracting officers during the past quarter? What issues were involved and what, if any, remedial measures were taken?

*n. How many contracting officers' final decisions were issued during the past quarter and past fiscal year? How many were appealed to the ASBCA or Claims Court?

o. What is the general attitude of the command group and staff concerning acquisition law issues? What actions have been taken to foster sensitivity to acquisition law issues?

*p. What safeguards are in place to avoid Equal Access to Justice Act (EAJA) liability when litigating with a small business?

*q. What is the command's policy concerning support of contract litigation? Is money available for travel, document copying, depositions, and experts?

18. Environmental Law

*a. Has an Environmental Law Specialist been appointed? What appropriate professional training has the Environmental Law Specialist received?

*b. How are environmental protection and preservation activities integrated into the planning and execution of the command's basic mission?

*c. In what way is the Environmental Law Specialist actively involved in the planning, execution, and monitoring of environmental programs?

*d. Is there coordination with key environmental personnel (installation environmental coordinator, local counsel for the Corps of Engineers, etc) so as to insure timely coordination of environmental issues?

*e. What permits have been issued to the command under authority of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Clean Air Act (CAA), or other environmental compliance statutes? How are these permits reviewed by the Environmental Law Specialist?

*f. Are there on-post hazardous waste sites? Are any of these scheduled for clean-up? Has the Environmental Law Specialist coordinated with the Environmental Protection Agency?

*g. What compliance agreements are there? Is the Environmental Law Specialist involved in negotiations?

19. Trial Defense Service

a. Are offices attractive and professional? Is there sufficient privacy?

b. Is office properly equipped and receiving sufficient administrative support?

c. Are experienced officers rotated into TDS?

d. Do TDS personnel have access to local training funds for civilian CLE?

20. Military Judges

a. Is support adequate?

*b. Are military judges enhancing the professional development of counsel as part of the Bridging the Gap Program?

21. International and Operations Law

a. Is there an active OPLAW program?

(1) Have attorney(s) within the office received training in OPLAW, and has an attorney specifically been designated to address OPLAW?

(2) Is the office actively involved in reviewing OPLANS?

(a) Are OPLANs reviewed from an overall OPLAW perspective, i.e., not from just a Law of War perspective?

(b) Do designated OPLAW attorneys possess the security clearances necessary to enable them to review OPLANS and other relevant documents?

(3) Do OPLAW attorneys have access to the Tactical Operations Center (TOC)?

(4) Have OPLAW attorneys established effective working relationships with key staff members?

b. Is there a program to support TRADOC and MACOM requirements for training regarding Geneva and Hague Conventions?

(1) Do senior attorneys take a personal interest in such program?

(2) Do attorneys participate in or review training?

(3) When an attorney is designated as an instructor at a TRADOC post, are there adequate hours provided for LOW training and current POI's prepared?

(4) What form has law of war training taken (Classroom, field exercises, CPX, etc.)?

(5) Are unit personnel trained to the DOD/Army standard, i.e., commensurate with their duties and responsibilities?

(6) Is there a viable, aggressive law of war training/preventive law program?

(7) Do attorneys participate in field training? In what capacity?

(8) Is there an attorney on the "Battle Staff"?

(9) Is there a billet for an attorney in the Tactical Operations Center (TOC)?

*(10) For personnel and unit exchanges which affect the unit or installation, does the office maintain a copy of the applicable MOU between the U.S. and foreign country?

*(11) Does the office maintain a compact, quick reference law library for short notice deployments and training exercises?

22. Overseas Offices

a. Is there an attorney within the office designated to handle SOFA matters?

b. Are senior attorneys and designated specialists familiar with the SOFA supplementary agreement and the provisions of AR 27–50?

c. Is there a certified trial observer in the office?

d. Are trial observer reports adequate and are there any problems in regard to rights guaranteed to US soldiers, dependents and civilians?

e. Are there good working relations with the local national prosecutors and policy officials?

f. Is the legal assistance attorney familiar with special problems facing the soldier overseas? Is there a local national attorney on the staff or available for consultations?

g. Is the claims attorney familiar with handling foreign claims?

23. Ethics (DA Pam 27–26)

a. Has an active training/review program been established to sensitize attorneys and support personnel to their ethical responsibilities?

b. What major issues/problems in the ethical conduct of office personnel have arisen in the past year? How were they resolved? Have the lessons learned been communicated to TJAGSA personnel responsible for instruction in this area?

c. Does every attorney have a personal copy of the new Army Rules of Professional Conduct for Lawyers? Are the rules being taught?

24. Felony Prosecution Program

a. Is there an awareness of the program, and what are the office plans to participate in the program?

b. If the program has been implemented, how is it progressing, and what tangible results have been achieved? What problems have been encountered; how have they been resolved; and have those problems, solutions, and results been communicated to DAJA–LTG, the OTJAG staff activity responsible for oversight of the program?

25. Regulatory Law

Are procedures in effect for learning of and reporting to JALS–RL of utility rate increases and other proposals affecting local Army activities?

26. Intellectual Property

a. Is there an awareness that Intellectual Property Law (IPL) assistance is available telephonically or in writing from the Intellectual Property Counsel of the Army?

b. Are any attorneys assigned to the office patent attorneys and/or interested in specializing in IPL; and, if so, are interested attorneys aware of the IPL LL.M. Program?

c. Has federal trademark protection been obtained or requested for eligible post/command newspapers?

*d. Are acquisition attorneys aware of recent changes to DOD policy on acquisition of rights in technical data (including computer software) published at 53 FR 10780–10798 (codified at 48 C.F.R. subpart 227.4) (effective 2 Apr 88), as corrected at 53 FR 20632–20634? Is DAC 86–13 (reflecting these changes) posted to the office copy of DOD FAR Suppl?

e. Does the post have an IPL related mission (e.g., AMC subcommands), and, if so:

(1) Are military attorneys assigned to the IPL Division?

(2) What training, if any, is provided to a military attorney prior to working in the IPL (particularly patents) field?

*f. Has authority to enter into Cooperative Research and Development Agreements (CRDA's) been delegated to a laboratory Director or Commander supported by an attorney? If so, are attorneys familiar with the 18 Jul 88, Revised Interim Guidelines for the Preparation and Review of CRDA's and Patent License Agreements promulgated by the Army Domestic Technology Transfer Program Manager?

27. Transition to War

a. Do contingency plans exist for a partial or complete (Division) (Corps) move out?

b. Do personnel have assigned roles for partial or complete move-outs?

c. Do personnel know what items of personal equipment they must have available for contingency plan execution?

d. Are contingency plans flexible?

e. Are contingency plans coordinated with the Headquarters and the HHC?

f. Do contingency plans provide for the need to prepare large numbers of personnel for overseas movement? Does the office have the ability to prepare large numbers of wills and powers of attorney on short notice? Do the contingency plans provide for bolstering the size of the legal assistance office?

28. Procurement Fraud

a. Has a Procurement Fraud Advisor (PFA) been appointed?

b. Does the PFA have an established Standard Operating Procedure (SOP) IAW Appendix F, AR 27–40?

c. Has the PFA established a working relationship with local investigative agencies to assure the prompt notification and coordination of all procurement fraud cases?

d. Has the PFA established a local training program, to keep commanders and investigators current on indicia of contract fraud?

e. Have there been or is there an ongoing case of contract fraud? If so:

(1) Was a "Procurement Flash Report" transmitted by DATAFAX IAW paragraph 8–5, AR 27–40?

(2) Was a comprehensive remedies plan developed and forwarded with the DFARS 9.472 Report IAW Appendix H, AR 27–40?

(3) Has the PFA continued to monitor all civil fraud recovery efforts, and provided continued technical assistance when required?

*Indicates material which has been modified or added.

A Preliminary Analysis of the Implementation of the Freedom of Information Reform Act of 1986

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Introduction

In the fall of 1986 President Reagan signed the Freedom of Information Reform Act of 1986,[1] establishing an entirely new fee and fee waiver scheme for the Freedom of Information Act (FOIA)[2] and, for the first time in the twenty-year history of the statute, expanding the categories of protected information.

The changes to the fee provisions were both significant and comprehensive. For the previous twelve years, FOIA fees had been "limited to reasonable standard charges for document search and duplication."[3] The administrative simplicity of that scheme, however, had the unfortunate effect of permitting business requesters to obtain volumes of information for commercial purposes while passing the costs of these reviews on to the taxpayers. While the amended fee provision has alleviated this deficiency, it has done so only as part of a complex framework that otherwise lowers or even totally eliminates previously assessable fees. This new multistep framework has the effect of increasing an agency's administrative burden by requiring new, often difficult, fee determinations.

As a "trade-off" for this increased administrative burden to federal agencies, comprehensive modifications have afforded law enforcement records additional document protection. In addition to expanding the coverage of the law enforcement exemption in several ways, the FOIA Reform Act delineated three categories of particularly sensitive law enforcement records that are now entirely "excluded" from the coverage of the statute.

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[1] Freedom of Information Act Reform Act, Pub. L. No. 99–570, §§ 1801–1804, 100 Stat. 3207, 3207–48 (1986) [hereinafter "FOIA Reform Act"].

[2] 5 U.S.C. § 552 (1982). Congress has twice amended the substantive provisions of the Freedom of Information Act. In 1974 Congress overrode President Ford's veto and narrowed the scope of information that could be protected under the national security and law enforcement exemptions. Congress also created various additional procedural provisions for the benefit of requesters, such as those establishing short time limits for agency responses and appeals, limiting fees to those incurred for document search and duplication, requiring nonexempt material to be segregated from otherwise exempt documents, allowing for *in camera* review, and providing a mechanism for disciplining employees responsible for arbitrary and capricious withholdings. Two years later, in reaction to the Supreme Court's holding in FAA v. Robertson, 422 U.S. 255, 265 (1975), Congress narrowed the category of statutes that qualified as nondisclosure statutes under Exemption 3. The FOIA has also been the subject of minor technical amendments in 1978 (pertaining to disciplinary proceedings) and in 1984 (repealing the expedited court-review provisions).

[3] 5 U.S.C. § 552(a)(4)(A) (1982). These limitations were imposed by the 1974 Amendments to the FOIA, which were chiefly intended to prohibit the then-common practice of agencies assessing fees for the time expended by personnel examining documents to determine whether an exemption applied, as well as for the time expended to delete exempt material.

This article summarizes the most significant changes resulting from the passage of the FOIA Reform Act, and discusses the implementation of these new provisions as they are likely to affect the practice of judge advocates.

New Fee and Fee Waiver Provisions

As in the past,[4] each agency remains obligated to publish regulations specifying the schedule of fees applicable to the processing of its FOIA requests.[5] Under the Reform Act, however, each agency's fee regulations must conform to "guidelines" establishing "a uniform schedule of fees" promulgated by the Office of Management and Budget (OMB) after public notice and comment.[6] Although the FOIA Reform Act provided that the new fee and fee waiver provisions were to become effective on April 25, 1987, one hundred and eighty days after the statute's enactment,[7] their complete applicability was statutorily conditioned on the agency having its final fee regulation in place by that date.[8] Because OMB was unable to complete the first step in the process until March 27, 1987,[9] neither the Department of Defense nor any other federal agency was able to complete this two-step process for implementing its fee regulations in a timely fashion. Ultimately, the Department of Defense published its final fee regulations on July 10, 1987[10] (with an effective date of August 10, 1987), which was still considerably earlier than most federal agencies.

Categorizing Requesters

The most significant change to the FOIA's fee structure is that it is now necessary to preliminarily categorize each FOIA requester. The significance of this categorization is that it determines the extent to which the agency may assess duplication,[11] search,[12] and the new review[13] fees. The most favored category of requesters includes "representative[s] of the news media" and educational or noncommercial scientific institutions whose purpose is scholarly or scientific research. Assuming that the requested documents are not sought for "commercial use," requesters qualifying for inclusion in this category may never be assessed search or review costs, only duplication costs.[14] The least favored category consists of all requesters seeking records for "commercial use," against whom search, duplication, and the new review charges are assessable.[15] Those requesters not falling into either of these two groups may be assessed search and duplication costs, but not review costs.[16]

Because of the economic significance of the fee-categorization determination,[17] it appears likely that the definitions

[4] 5 U.S.C. § 552(a)(4) (1982).

[5] 5 U.S.C. § 552(a)(4)(A)(i) (Supp. IV 1986). These fees apply to the processing of all FOIA requests, except that they shall not "supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records." 5 U.S.C. § 552(a)(4)(A)(vi) (Supp. IV 1986). Dep't of Defense Regulation 5400.7–R, DOD Freedom of Information Act Program (June 1987, published in the Federal Register at 52 Fed. Reg. 25976, 25977–6000 (July 10, 1987)) [hereinafter DOD Reg. 5400.7–R], para. 6–101a, offers as examples the statutory provisions enabling the Government Printing Office and the National Technical Information Service to set and collect fees. It also reminds DOD components to advise requesters of the steps necessary to obtain directly otherwise responsive records from such federal activities. Although not cross-referenced in paragraph 6–101a, an example of a qualifying statute of particular interest to the military community is 10 U.S.C. § 2328 (Supp. IV 1986), *as amended by* the Defense Technical Corrections Act of 1987, Pub. L. No. 100–26 (April 21, 1987), which provides for a uniform schedule of fees (as well as its own unique fee waiver standard) for records requested under the FOIA that consist of technical data as defined in 10 U.S.C. § 2302(4). The schedule of fees for technical data—set out at DOD Reg. 5400.7–R, para. 6–300—is similar, but not identical, to those imposed on all other records held by components of the Department of Defense. On the other hand, the statutory standard for waiving fees for records consisting of technical data bears practically no relation to the FOIA's fee waiver standard. *Compare* 10 U.S.C. § 2341(c), *as amended, with* 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. IV 1986).

[6] OMB interpreted the language in 5 U.S.C. § 552(a)(4)(A)(iv) (Supp. IV 1986) ("Fee schedules shall provide for the recovery of direct costs of search, duplication, or review"), to mean that it was not required to provide a single set of fees for FOIA services to be used at all agencies because "direct costs" varied widely from agency to agency. *See* Freedom of Information Reform Act of 1986 (Pub. L. 99–570) Proposed Fee Schedule and Administrative Guidelines, 52 Fed. Reg. 1992 (Jan. 16, 1987). Instead, OMB interpreted its obligation under 5 U.S.C. § 552(a)(4)(A)(I) (Supp. IV 1986) to promulgate "guidelines . . . which shall provide for a uniform schedule of fees for all agencies" as an obligation to provide only "a set of definitions and procedures that will permit agencies to develop their own rates in conformance with government-wide standards." *See* Freedom of Information Reform Act of 1986 (Pub. L. 99–570) Proposed Fee Schedule and Administrative Guidelines, 52 Fed. Reg. 1992 (Jan. 16, 1987).

[7] Pub. L. No. 99–570, § 1804(b)(1) (not codified).

[8] *Id.*

[9] Uniform Freedom of Information Fee Schedule and Guidelines, 52 Fed. Reg. 10012–20 (Mar. 27, 1987) [hereinafter OMB Guidelines].

[10] 52 Fed. Reg. 25976, 25977–6001 (July 10, 1987).

[11] Duplication costs are those incurred in "the process of making a copy of a document in response to a FOIA request." DOD Reg. 5400.7–R, para 6–101d. Copies, which should be in a format reasonably usable by requesters, can take the form of "paper copy, microfiche, audiovisual, or machine readable documentation (e.g., magnetic copy or disc)." *Id.* Duplication costs vary from $.02/page for preprinted material, to $.15/page for office photocopies, to $.25/page for microfiche, and the actual cost (including operator's time) of reproducing computer tapes or generating computer printouts. *Id.* at para. 6–202.

[12] A search "includes all time spent looking for material that is responsive to a request." DOD Reg. 5400.7–R, para. 6–101c. It includes not only the time expended in searching for a document, but may also include a page-by-page or line-by-line review of a document to determine if it contains material responsive to the request. *Id.* It does not, however, include the time expended in determining whether an exemption applies. *Id.* Manual search fees are to be assessed at the rate of $12.00/hour for those conducted by E9/GS8 and below, at the rate of $25.00/hour for 01–06/GS9–GS/GM15, and at the rate of $45.00/hour for 07/GS/GM16/ESI and above. *Id.* at para. 6–201a. Computer search fees are to be assessed based on the direct cost of the central processing unit, input-output devices, memory capacity of the actual computer configuration, and the salary of the computer operator. *Id.* at para. 6–201b.

[13] Review costs are those incurred by "examining documents located in response to an FOIA request to determine whether one or more of the statutory exemptions permit withholding." DOD Reg. 5400.7–R, para. 6–101e. This includes the time spent preparing documents for release by excising exempt information and making photocopies of those excised copies, but it does not include "the time spent resolving general legal or policy issues regarding the application of exemptions." *Id.* Review costs are assessed at the same rates as search costs. *Id.*, para. 6–203.

[14] 5 U.S.C. § 552(a)(4)(a)(ii)(II) (Supp. IV 1986); DOD Reg. 5400.7–R, para. 6–104d, e, and g.

[15] 5 U.S.C. § 552(a)(4)(A)(ii)(I) (Supp. IV 1986): DOD Reg. 5400.7–R, para 6–104c.

[16] 5 U.S.C. § 552(a)(4)(A)(ii)(II) (Supp. IV 1986): DOD Reg. 5400.7–R, para 6–104f.

[17] As discussed *infra*, this determination also affects certain fee restrictions with respect to whether the first 100 pages of records and the first two hours of search time must be provided without cost.

set out in the OMB Guidelines of the particular statutory terms—and all federal agencies' application of them—will be the subject of great contention and close scrutiny, particularly if *National Security Archive v. Department of Defense*[18] serves as the litigation prototype. In that case the requester argued that OMB's guidelines were not controlling with respect to agency definitions of requester fee categories and that the Department of Defense's definitions (which were identical to OMB's on the contested issues of "educational institution" and "representative of the news media") should be struck down as contrary to the statutory language and underlying legislative intent.[19] Without addressing whether OMB's guidelines are necessarily controlling, the district court firmly rejected the challenge. After observing that the 1986 FOIA Reform Act expressly delegated to the agencies the responsibility for implementing the new fee structure, it found that the Department of Defense's interpretation was "not only a reasonable one, but it is also the one Congress most likely intended."[20]

One of the most important of the fee-category definitions is that of "commercial use," which, if applicable, can even disqualify a requester from otherwise favorable treatment as a scientific or educational institution and place it into the most costly fee category. A commercial use requester is one who seeks records for a "use or purpose that furthers the commercial, trade, or profit interest of the requester or on whose behalf the request is made."[21] This definition could include nonprofit requesters, if their purpose is commercial.[22] It should be noted that a request by an attorney should not automatically be considered commercial, but should be analyzed to determine the purpose for which the *client* seeks the information. Accordingly, a request made by an attorney on behalf of a business client in connection with a government contract may be a commercial use, while one made on behalf of a newspaper would likely fall into the most favored category. Similarly, a request by an attorney in connection with a personal injury suit under the Federal Tort Claims Act would probably fall in the intermediate category.[23] Of course, if an attorney is seeking records for the purpose of directly advancing his or her own law practice, and not on behalf of any particular client, such a use would be "commercial."

With respect to one of the other important fee categories, the Department of Defense has adopted OMB's somewhat forced definition of "educational institution requester," which includes pre-schools, elementary or secondary schools, undergraduate and graduate institutions, and vocational schools, so long as the entity "operates a program or programs of scholarly research."[24] Although not further detailed in the DOD regulation, the OMB Guidelines explicitly limit this definition to requests made on behalf of the institution, such as those made by a professor; requests by students pursuing their own academic research projects are not included.[25] Less controversial is the DOD regulation's definition of "scientific institution requesters," which are those entities operated solely for the purpose of conducting scientific research, the results of which will not promote any particular product or industry.[26] Finally, the third entity in this favored category, "representative of the news media," is defined by the regulation as "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public."[27] News is defined as "information that is about current events

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[18] 690 F. Supp. 17 (D.D.C. 1988) (appeal pending). The National Security Archive is an entity created in 1985 by former *Washington Post* reporter Scott Armstrong with the avowed purpose to "identify, obtain, house, index, analyze, and disseminate contemporary, declassified and unclassified United States government documents pertaining to foreign, defense, intelligence and national security policy." FOIA Update. Winter 1986, at 1. (*FOIA Update* is the Department of Justice's governmentwide FOIA policy publication, which is issued quarterly by the Office of Information and Privacy.) Because the National Security Archive acts as a clearinghouse by affording journalists, researchers, and others access to the information it accumulates, *id.*, it had asserted that it should qualify both as an educational institution and as a representative of the news media, thereby being obligated to pay only duplication fees. *National Security Archive v. Department of Defense*, 690 F. Supp. at 18.

[19] *National Security Archive v. Department of Defense*, 690 F. Supp. at 18–20.

[20] *Id.* at 22.

[21] DOD Reg. 5400.7–R, para. 6–104d.1.

[22] The term "commercial" has been held, in the context of FOIA's Exemption 4, to include records relating to nonprofit entities. *See, e.g.*, Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (trade association's safety reports); Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 398 (5th Cir.) (nonprofit water supply company's audit reports), *cert. denied*, 471 U.S. 1137 (1985); American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (information submitted by union).

[23] The Ninth Circuit Court of Appeals has interpreted the term "commercial" in the closely analogous context of the new fee waiver standard ("not primarily in the commercial interest of the requester," 5 U.S.C. § 552(a)(4)(A)(iii)), not to include "[c]laims for damages . . . —at least not when the claims are grounded in tort." McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1285 (9th Cir. 1987). In that case, where the members of the plaintiff organization had filed individual claims against the Air Force for "damage and injury from toxic waste disposal," *id.* at 1283, the Ninth Circuit held that "[i]nformation helpful to a tort claim furthers a requester's interest in compensation or retribution, but not an interest in commerce, trade, or profit." *Id.* at 1285. While the result appears to be correct with respect to these individual litigants, the language seems overly broad, particularly where one corporate giant is seeking to "discover" through FOIA government documents to use in litigation against another corporate giant, regardless of the underlying cause of action.

[24] DOD Reg. 5400.7–R, para. 6–104d. OMB apparently believed it necessary to base its definition on one already recognized by statute. After rejecting the definition set out in the Internal Revenue Code, 26 U.S.C. § 501(c)(3), and its implementing regulations as "somewhat vague" and "too general," it adopted the one employed in 20 U.S.C. § 1681(c) in connection with the prohibition of discrimination based on sex in educational institutions. *See* OMB Guidelines, 52 Fed. Reg. at 10014. OMB did this, even though it recognized that "it is unlikely that a preschool or elementary or secondary school would be able to qualify" because few such schools "operate a program or programs of scholarly research." *Id.* This definition, as implemented by the Department of Defense, has been held to be a reasonable implementation of the statutory provision. *National Security Archive v. Department of Defense*, 690 F. Supp. at 21–22 (D.D.C. 1988).

[25] OMB Guidelines, 52 Fed. Reg. at 10014.

[26] DOD Reg. 5400.7–R, para. 6–104e.

[27] *Id.* at para. 6–104g.1. This definition has been held to be a reasonable implementation of the statutory provision. National Security Archive v. Department of Defense, 690 F. Supp. at 21–22 (D.D.C. 1988).

or that would be of current interest to the public."[28] "Free-lance" journalists qualify only if "they can demonstrate a solid basis for expecting publication" through a radio or television station broadcasting to the public at large or through a publisher of a news periodical.[29] A publication contract or a proven track record of publication would be convincing evidence on this issue.[30]

In one of the first judicial decisions to wrestle with the definition of "a representative of the news media," *Southam News v. Immigration & Naturalization Service,*[31] the district court rejected the Federal Bureau of Investigation's interpretation of this term, which did not include a Canadian news organization that serviced only Canadian newspapers. The FBI's rationale for its determination focused on the principal purpose of the FOIA—to foster a more informed electorate; accordingly, the FBI declined to afford this extraordinary treatment of free, unlimited document searches to media requesters unless "the primary beneficiary of the disclosure is the American, rather than a foreign public."[32] (The records sought included those reflecting the identities of Canadian citizens who were excluded from entry into the United States under the McCarren Act.) By rejecting the FBI's interpretation as doing "violence to the plain wording of the statute,"[33] the court required the agency to conduct a search for the requested documents for which it could not assess its estimated $1,700 search fee. Whether this holding will be followed in analogous factual contexts remains to be seen.

Although the FOIA Reform Act is silent on this point, a preliminary procedural ruling in *National Security Archive v. Department of Defense*[34] requires the agency (at least in any case in which it contemplates assessing a fee) to advise the requester in writing of its determination as to which of the three categories it has assigned the requester and its reasons for doing so.[35] If the agency lacks sufficient information to make such a determination, it must so advise the requester and state what information it needs.[36] This determination should be made with particular care, because, according to the first judicial interpretation on this issue, it will be an "across-the-board determination." All subsequent requests by that requester to the same agency will be governed by the initial determination, regardless of the particular records sought.[37]

Minimum Fee Levels

Even in those circumstances when specified fees are applicable to a particular category of requester, the FOIA Reform Act imposes various limitations on the assessment of these fees. To begin with, the most favored category of requesters (educational, noncommercial scientific institutions, and representatives of the news media), against whom search and review fees can never be assessed, cannot be charged duplication fees for the first one hundred pages disclosed.[38] The intermediate category of requesters (those noncommercial requesters who do not fall into the most favored group), against whom review fees can never be assessed, similarly cannot be charged duplication fees for the first one hundred pages disclosed, nor can they be charged search fees for the first two hours of search.[39] Commercial requesters, on the other hand, are assessed the full direct costs of duplication, search, and review, subject to one limitation.[40]

The final step that must be taken to compute the fees to be assessed is to determine whether the "costs of routine collection and processing of the fees are likely to equal or exceed the amount of the fee."[41] These costs vary from agency to agency, but at the Department of Defense they have been determined to be $15.00.[42] (To avoid the possibility that a requester or group of requesters would be able to circumvent the assessment of lawful fees by dividing a requester into several subparts in an attempt to take inappropriate advantage of these fee limitations, the DOD

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[28] DOD Reg. 5400.7–R, para. 6–104g.1.

[29] *Id.*

[30] *Id.*

[31] 674 F. Supp. 881 (D.D.C. 1987).

[32] *Id.* at 892.

[33] *Id.*

[34] Civil No. 86–3454, slip op. at 3 (D.D.C. Sept. 30, 1987).

[35] *Id.*

[36] *Id.* These judicially imposed requirements closely parallel the notice provisions administratively imposed by DOD Reg. 5400.7–R, para. 6–104b.1., which requires a component to analyze each request to determine its proper fee category and, if that determination is different than claimed by the requester, to advise the requester of what additional justification is necessary. If the requester does not respond within thirty days (or presumably soon thereafter if he does respond), the component will issue a final fee-category determination and advise the requester of his administrative appeal rights. No action will be taken on the request pending such an appeal unless the requester has agreed to pay the costs appropriate for the category determined by the component.

[37] National Security Archive v. Department of Defense, Civil No. 86–3454, slip op. at 4 (D.D.C. Sept. 30, 1987).

[38] 5 U.S.C. § 552(a)(4)(A)(iv)(II) (Supp. IV 1986); DOD Reg. 5400.7R, para. 6–104d, e, f, and g. In the context of this restriction it should be noted that "pages" are considered to those "of a standard size." *Id.* at para. 6–102d. Therefore, a requester "would not be entitled to 100 microfiche or 100 computer disks." *Id.* Raising but not resolving the actual application of this restriction in this context is the last sentence of para. 6–102d: "A microfiche containing the equivalent of 100 pages or 100 pages of computer printout[,] however, might meet the terms of the restriction."

[39] 5 U.S.C. § 552(a)(4)(A)(iv)(II) (Supp. IV 1986); DOD Reg. 5400.7R, para. 104f. In the context of this restriction, DOD Reg. 5400.7–R, para. 6–102e, provides that if a computerized search is required to process the request, the first two free hours will be determined by calculating the sum of "the salary scale of the individual operating the computer" and other direct costs of the system. The amount of free computer search services will be that equivalent to the cost of two hours of manual search at the clerical level ($24.00). *Id.*

[40] DOD Reg. 5400.7–R, para. 6–104c.2.

[41] 5 U.S.C. § 552(a)(4)(A)(iv)(I) (Supp. IV 1986). This provision was enacted as a cost-saving measure because some agencies assessed fees for amounts as low as $3.00, even though they actually lost money processing such small fees.

[42] DOD Reg. 5400.7–R, para. 6–103b.

Regulation authorizes the aggregation of such requests.)[43] Therefore, if the total amount of the fee to be assessed, regardless of the category of requester, is $15.00 or less, the fee is "waived automatically."[44]

It should be remembered that these two minimum fee provisions work in tandem. Therefore, a Department of Defense component may not begin to assess fees until after it has provided any applicable free search and duplication, and only then if its fee is greater than $15.00.

Restrictions on Advance Payments

A further procedural change effected by the FOIA Reform Act prohibits an agency from requiring "advance payment of any fee unless the requester has previously failed to pay the fees in a timely fashion, or the agency has determined that the fee will exceed $250."[45] The Department of Defense has implemented this provision by requiring a requester who has previously failed to pay FOIA fees in a timely fashion ("30 calendar days from the date of billing"),[46] to pay the full amount of the prior fee still owed, plus interest on that amount,[47] and an advance payment of the total estimated fee (regardless of amount) before the component begins to process a new request or continues to process a pending request.[48]

Although the regulation provides no guidance on where to locate a requester's past history of payments (from records of that initial denial authority, the component, or the Department of Defense), the regulation bases a component's response on this history. (It would appear impractical to search beyond the records of the initial denial authority, without specific information that the requester at issue is a scofflaw.) If the requester has a history of prompt payment, at the same time the component advises him of the fee category to which he has been assigned, it should obtain a satisfactory assurance of full payment—in other words, an unqualified promise to pay.[49] Upon receiving a promise to pay from a requester "with a history of prompt payment," and upon completion of the processing of such a request, the component will promptly forward the documents, because it "may not hold documents ready for release pending payment from [such] requesters."[50] If the requester has no history of payment, at the time the component advises him of the fee category to which he has been assigned, the component will require an "advance payment"—that is, a payment prior to commencing any search or processing activities—of the total estimated fee, assuming the fee is over $250.00.[51] For a requester with no history of payment who has agreed to pay an estimated fee of less than $250.00, the component may request payment after processing the records but prior to forwarding them to the requester.[52] Finally, it should be noted that the ten-working-day administrative time limit for responding to a FOIA request commences only after the component receives, to the extent either is applicable, an advance payment or a promise to pay the estimated fees.[53]

New Fee Waiver Standard

Prior to the 1986 amendments, the FOIA provided that "[d]ocuments shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public."[54] It now provides that documents shall be furnished without any charge or at a reduced charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."[55] It appears that the ultimate determination of most, but not all, fee waiver requests will not vary as a result of the newly amended standard. To the extent that there are differences, they are noted below.

In order to assist agencies in complying with the new statutory requirement that each agency promulgate regulations "establishing procedures and guidelines for determining when such fees should be waived or reduced,"[56] the Department of Justice issued a fee waiver policy guidance memorandum to the heads of all federal agencies on April 2, 1987, which set out six factors it recommended that agencies utilize in drafting their new regulations and, subsequently, in making their fee waiver

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[43] DOD Reg. 5400.7–R, para. 6–105, discusses the factors to be considered when determining whether to aggregate multiple requests. It states that a series of requests submitted within a thirty-day period may be presumed to be made to avoid fees. *Id.* It prohibits, however, the aggregation of multiple requests "on unrelated subjects from one requester." *Id.*

[44] DOD Reg. 5400.7–R, para. 6–103b. Although this is consistent with prior practice, it is unfortunate, and perhaps somewhat confusing, that DOD has chosen to set out this provision in its fee waiver paragraph. Analytically, this minimum fee limitation is just that, and not an amount "waived automatically," because a fee below this amount cannot lawfully be assessed. Because it cannot be assessed in the first place, it cannot properly be termed to be "waived."

[45] 5 U.S.C. § 552(a)(4)(A)(v) (Supp. IV 1986).

[46] DOD Reg. 5400.7–R, para. 6–104b.5.

[47] Interest is to be charged at the rate prescribed in 31 U.S.C. § 3717 (1982), after confirming the amount with the appropriate Finance and Accounting Offices. DOD Reg. 5400.7–R, para. 6–104b.7.

[48] DOD Reg. 5400.7–R, para. 6–104b.7.

[49] *Id.* at para. 6–104b.6.

[50] *Id.* at para. 6–104b.8.

[51] *Id.*

[52] *Id.*

[53] *Id.* at para. 6–104b.9.

[54] 5 U.S.C. § 552(a)(4)(A) (1982).

[55] 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. IV 1986).

[56] 5 U.S.C. § 552(a)(4)(i) (Supp. IV 1986).

determinations.[57] The Department of Defense's regulation, which in almost every respect tracks the six factors recommended by the Department of Justice, was extensively referenced and applied by the Ninth Circuit Court of Appeals in the first appellate decision to interpret the new fee waiver standard, *McClellan Ecological Seepage Situation v. Carlucci.*[58] The six factors are as follows:

1. The subject of the request.[59] A component must determine whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Department of Defense. An example of a request that would not qualify on this basis would be one for records submitted by nongovernment entities that are sought for their own intrinsic content rather than to reflect upon the agency's operations and activities. By so limiting the subject matter of records eligible for fee waivers, albeit only slightly, the amended standard is more stringent than its predecessor. In the only departure of note from the Justice Department's guidance, the regulation suggests that records of considerable age may not be entitled to a fee waiver to the extent that they do "not bear directly on the current activities of the DoD."[60] The requirement that the records reflect on "current" activities would appear to provide a basis for denying most fee waiver requests for records of interest to historians. The extent to which this position can be successfully supported in litigation should be of particular interest.

2. The informative value of the information to be disclosed.[61] This factor requires that the disclosable substantive content of the record meaningfully inform the public of the operations or activities of the agency. An example of a record that would not qualify under this factor would be one that contains information which is duplicative or nearly identical to that already existing in the public domain.[62]

3. The contribution to, and understanding of, the subject by the general public that is likely to result from disclosure.[63] This factor focuses on whether the disclosure is likely to inform the public in general, as opposed to providing information only to the individual requester or a small segment of the public.[64] In determining whether this criterion has been satisfied, it is entirely appropriate to require requesters to set forth their qualifications, explain the nature of their research, and describe their intended means of dissemination to the public.[65] Bare assertions that the requester intends to author a book, without more, are insufficient to show that the public is likely to benefit from the disclosure.[66]

4. The significance of the contribution to the public's understanding.[67] This factor requires a component to determine whether disclosure of the requested information on a current subject of wide public interest is unique in contributing previously unknown facts, as opposed to merely duplicating that which is already known to the general public. Components are instructed, however, not to "make value judgments as to whether the information is *important* enough to be made public."[68]

5. The existence and magnitude of a commercial interest.[69] Here, a component must first determine whether the requester has any commercial interest that would be served by disclosure, and if so, to what extent. No longer is a requester's personal, noncommercial interest disqualifying. In

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[57] The memorandum, issued pursuant to the Department of Justice's responsibility to ensure agency compliance with the FOIA, *see* 5 U.S.C. § 552(e) (Supp. IV 1986) is published in its entirety in *FOIA Update,* Winter/Spring, 1987, at 3–10.

[58] 835 F.2d. at 1285–87.

[59] DOD Reg. 5400.7–R, para. 6–103c.1.(i).

[60] *Id.*

[61] DOD Reg. 5400.7–R, para. 6–103c.1.(ii).

[62] *Id. But see McClellan Ecological Seepage Situation v. Carlucci,* 835 F.2d at 1286 (dictum) ("Although the information requesters seek is not all new, the information could support public oversight of [McClellan Air Force Base's] operations, including the effect [its] water pollution policy has on public health."). For an example of the principle articulated in the DOD Regulation, as applied under the prior fee waiver standard, see Blakey v. Department of Justice, 549 F. Supp. 362, 364–65 (D.D.C. 1982) (denying fee waiver for records available in the FBI's reading room at the time of the request), *aff'd mem.*, 720 F.2d 215 (D.C. Cir. 1983).

[63] DOD Reg. 5400.7–R, para. 6–103c.1.(iii).

[64] *Id. See, e.g.,* Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (affirming denial of fee waiver concerning subject matter of "[u]ndeniabl[e]" public interest where requester failed to establish on the administrative record the manner in which he intended to disseminate the requested information, "his purpose for seeking the requested material or his professional or personal contacts with any major newspaper companies"); *McClellen Ecological Seepage Situation v. Carlucci,* 835 F.2d at 1286 ("Requesters state that the public they intend to benefit consists of Sacramento residents. Based on the record, however, disclosure of this information likely would result in only limited public understanding in Sacramento."). For examples of this principle applied under the prior fee waiver standard, see National Treasury Employees Union v. Griffin, 811 F.2d 644, 648 (D.C. Cir. 1987) (rejecting "union's suggestion that its size ensures that any benefit to it amounts to a public benefit"); Burriss v. CIA, 524 F. Supp. 448, 449 (M.D. Tenn. 1981) ("[I]n simple terms, the public should not foot the bill unless it will be the primary beneficiary of the [disclosure].").

On a related point, one decision interpreting the term "public" in the context of the new fee waiver standard, *Southam News v. Immigration and Naturalization Serv.*, 674 F. Supp. at 892, rejected the agency's denial of a request by a foreign news agency, stating that "it will not do to maintain that Canadian news stories dealing with the application of American laws would not be of benefit to the American public." The particular facts of this case may well limit its applicability to Canadian requesters.

[65] *See McClellan Ecological Seepage Situation v. Carlucci,* 835 F.2d at 1287 (observing that "[t]he fee waiver statute nowhere suggests that an agency may not ask for more information if the requester fails to provide enough," and holding that the twenty-three questions propounded concerning the requester's identity, history, ability to absorb and disseminate information and its specific plans to use the information "did not seek a burdensome amount of information from requesters").

[66] *See, e.g., Burris v. CIA,* 524 F. Supp. at 449 (holding such assertions insufficient under prior fee waiver standard); *see also Larson v. CIA,* 843 F.2d at 1483 (bare assertion that requester would disseminate requested information to an unidentified "newspaper company" insufficient).

[67] DOD Reg. 5400.7–R, para. 6–103c.1.(iv).

[68] *Id.* (Emphasis in the original.)

[69] DOD Reg. 5400.7–R, para. 6–103c.2.(i).

this respect, the new fee waiver standard is more easily satisfied than the standard applicable under the prior law.[70]

6. The primary interest in disclosure.[71] If a component has determined that the requester does have a commercial interest, it must then determine whether the disclosure would be primarily in that interest; this requires a balancing of the commercial interest against the previously determined public benefit from disclosure. News media organizations developing a story, and academics engaged in research that is likely to result in scholarly publication, are both requesters with commercial interests that are presumptively considered to be secondary to the end of informing or educating the public.[72] On the other hand, data brokers or others who compile government information for marketing are generally considered to be acting primarily in their own commercial interests, and therefore not entitled to fee waivers.[73]

In addition to altering the standard for determining whether a fee waiver is to be granted, the FOIA Reform Act expressly established an entirely new and unique judicial basis for reviewing the propriety of an agency's denial of a fee waiver.[74] In all challenges to fee waiver denials "the court shall determine the matter *de novo*," applying the more rigorous standard of review previously utilized in the FOIA only in reviewing an agency's disclosure determinations;[75] however, the scope of "review of the matter shall be limited to the record before the agency."[76] This limited scope of review, and the unwillingness of the courts to permit the *post hoc* supplementation of the agency record,[77] continue to make it essential that a component, at both the initial denial level and at the administrative appeal level, carefully and comprehensively detail the basis for its action whenever it denies a request for a fee waiver.

New Protections for Law Enforcement Records

In four separate contexts, the FOIA Reform Act affords greater protection for sensitive law enforcement records than that available under the 1974 FOIA Amendments.[78] First, Exemption 7's threshold has been expanded. Second, there is a lower burden on the agency to demonstrate that a particular harm will result from disclosure. Third, the coverage of Exemption 7(D) has been clarified, and that of Exemptions 7(E) and 7(F) has been expanded. Finally, unprecedented protection has been provided to three particularly sensitive categories of law enforcement records that are now entirely "excluded" from the coverage of the FOIA.

Expanded Exemption 7 Threshold

Prior to the enactment of the FOIA Reform Act, Exemption 7's protections were limited to "investigatory records compiled for law enforcement purposes."[79] The threshold language of this exemption has now been modified by the FOIA Reform Act in two respects; by deleting the word "investigatory" and adding the words "or information," Exemption 7 now has the potential to extend to all "records or information compiled for law enforcement purposes."

The deletion of the word "investigatory" from this exemption should now permit agencies to consider withholding at least three new categories of law enforcement records: 1) guidelines describing the manner in which prosecutorial discretion is to be exercised, 2) manuals which set out law enforcement techniques or procedures, and 3) reports reflecting only routine monitoring or compliance oversight, rather than "focus[ing] with special intensity upon a particular party," as was previously required.[80] The addition of the term "or information"

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[70] Under the prior standard, if any personal benefit—even a noncommercial one—outweighed the public benefit to be gained from disclosure, it would be inappropriate to grant a fee waiver. *See, e.g.*, Ely v. United States Postal Service, Civil No. 83-235, slip op. at 13 (D.D.C. Mar. 29, 1984), *aff'd*, 753 F.2d 163 (D.C. Cir.), *cert. denied*, 471 U.S. 1106 (1985); Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979); Rizzo v. Tyler, 438 F. Supp. 895, 900 (S.D.N.Y. 1977). If the primary purpose for seeking the records is personal, however, albeit noncommercial, it may be considered in connection with whether disclosure will contribute to "public understanding". *See McClellan Ecological Seepage Situation*, 835 F.2d at 1287 ("[I]nsofar as a requester seeks information merely to advance private lawsuits—or administrative claims—we will consider disclosure less 'likely to contribute . . . to public understanding.' ") (quoting 5 U.S.C. § 552(a)(4)(A)(iii) (1982)).

[71] DOD Reg. 5400.7-R, para. 6-103c.2.(ii).

[72] *Id.*

[73] *Id.*

[74] Previously, almost all courts concluded that "the proper standard of judicial review of an agency's denial of a fee waiver is whether that decision is arbitrary or capricious," in accordance with the Administrative Procedure Act, 5 U.S.C. § 706 (1982). *Eudey v. CIA*, 478 F. Supp. at 1176. *See, e.g., Ely v. United States Postal Service*, 753 F.2d at 165; Ettlinger v. FBI, 596 F. Sup. 867, 871 (D. Mass. 1984); Diamond v. FBI, 548 F. Sup. 1158, 1160 (S.D.N.Y. 1982). *But see Rizzo v. Tyler*, 438 F. Supp. at 899.

[75] *See* 5 U.S.C. § 552(a)(4)(B) (Supp. IV 1986).

[76] 5 U.S.C. § 552(a)(4)(A)(vii) (Supp. IV 1986).

[77] *See, e.g., Larson v. CIA*, 843 F.2d at 1483; *National Employees Treasury Union v. Griffin*, 811 F.2d at 648.

[78] A detailed discussion of the law enforcement provisions under the FOIA Reform Act is set out in the Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act (December 1987). It should be noted that in contrast to the new fee and fee waiver provisions, the law enforcement provisions became effective on the date of enactment (October 27, 1986) and "apply with respect to any requests for records, whether or not the request was made prior to such date, and shall apply to any civil action pending on such date." Pub. L. No. 99-570, § 1804 (not codified).

[79] 5 U.S.C. § 552(b)(7) (1982).

[80] Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. 1974). Decisions which had previously denied Exemption 7 protection based on the records' lack of an "investigatory" character appear now to serve as examples of "records or information" which could be expected to qualify under the FOIA Reform Act's broadened standard. *See, e.g.*, Cox v. Department of Justice, 576 F.2d 1302, 1310 (5th Cir. 1978) (DEA law enforcement manual containing investigatory techniques and procedures not compiled for any particular investigation); Sears, Roebuck & Co. v. GSA, 509 F.2d 527, 529-30 (D.C. Cir. 1974) (civil rights compliance reports submitted by federal contractors); Goldschmidt v. Department of Agriculture, 557 F. Supp. 274, 276-77 (D.D.C. 1983) (poultry plant inspection reports used for information gathering and negotiations in the agency's continuous inspection program); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 750-51 (D.D.C. 1983) (negotiations over whether to reduce burdens imposed on auto industry under a consent decree).

incorporates the holding in *FBI v. Abramson*[81] that information compiled originally for law enforcement purposes does not lose its Exemption 7 status when re-compiled in a document whose purpose is not law enforcement. This change also serves to codify the results of those cases that represent the mirror image of *FBI v. Abramson* by affording Exemption 7 protection to records originally compiled for purposes other than law enforcement, which have subsequently become re-compiled in a law enforcement file.[82]

Lessening the Burden of Demonstrating a Risk of Harm

Prior to amendment, in order to invoke Exemption 7, the agency had to show that disclosure "would" cause at least one of the harms described in the exemption's subparts. For Exemptions 7(A), 7(C), 7(D), and 7(F), the FOIA Reform Act has lowered the agency's burden of demonstrating the likelihood that the particular harm described would occur; the agency need only show that the harm "could reasonably be expected" to occur.[83] This relieves agencies "of the burden of proving to a certainty that the threatened harm from disclosure will occur,"[84] because that burden is now "to be measured by a standard of reasonableness, which takes into account the 'lack of certainty in attempting to predict harm' while providing an objective test."[85] This modification also has the effect of affording protection for additional records and information not previously protected under this exemption.[86]

Modifications of Exemptions 7(D), 7(E) and 7(F)

In addition to broadening Exemption 7's threshold and lessening the burden of proof for its invocation, the FOIA Reform Act substantively modified the provisions of three of its subparts. It did so by clarifying the coverage of Exemption 7(D) and expanding the protections of Exemptions 7(E) and 7(F).

Exemption 7(D) now expressly provides that all state, local and foreign agencies, and any private institutions that furnish information on a confidential basis are entitled to protection as confidential sources.[87] This clarification conforms the language of the exemption to the holdings of the vast majority of cases interpreting the scope of the term "confidential source."[88] Similarly, the deletion of the words "confidential" and "only" from the exemption's second clause now remove any question that, in the context of a criminal or national security investigation, *all* "information provided by a confidential source" may be protected.[89]

Exemption 7(E)'s coverage has been extended by deleting the prior requirement that the law enforcement technique or procedure be "investigative," and adding an alternative category of protectible records.[90] Now all law enforcement manuals and other generic, rather than case-specific, records that reflect techniques or procedures employed in connection with law enforcement investigations or prosecutions can be protected.[91] Additionally, a new clause protects guidelines for law enforcement investigations or

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[81] 456 U.S. 615, 624 (1982).

[82] *See, e.g.*, Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980); Fedders Corp. v. FTC, 494 F. Supp. 325, 328 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980). Strangely, the only two post-FOIA Reform Act cases to face the issue rested their decisions on the language of the 1974 Amendments. *See* John Doe Corp. v. John Doe Agency, 850 F.2d 105, 108–109 (2d Cir. 1988) (refusing to grant Exemption 7 protection; ignoring 1986 Amendments); Gould v. GSA, 688 F. Supp. 689, 697–703 & n.26 (D.D.C. 1988) (granting Exemption 7 protection, and noting that no court "has viewed the 1986 Amendments as in any way narrowing the scope of Exemption 7").

[83] These provisions now protect records or information compiled for law enforcement purposes, the disclosure of which
(A) could reasonably be expected to interfere with enforcement proceedings, ...
(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
(D) could reasonably be expected to disclose the identity of a confidential source, . . . [or in records of criminal or national security investigations] information furnished by a confidential source, . . . [or]
(F) could reasonably be expected to endanger the life or physical safety of any individual.
5 U.S.C. § 552(b)(7)(A), (7)(C), (7)(D), and (7)(F) (Supp. IV 1986). The "could reasonably be expected to" harm standard was incorporated into part of the new formulation of Exemption 7(E), discussed *infra*. Exemption 7(B), which provides protection for law enforcement records or information the disclosure of which "would deprive a person of a right to a fair trial or impartial adjudication," was unchanged inasmuch as no need for the lowering of the harm standard for this rarely employed subpart was demonstrated.

[84] Reporters Comm. for Freedom of the Press v. Department of Justice, 816 F.2d 730, 738 (D.C. Cir.), *modified on denial of petition for panel reh'g*, 831 F.2d 1124 (D.C. Cir. 1987), *reh'g en banc denied*, No. 85–6020 (D.C. Cir. Dec. 4, 1987), *cert. granted*, 108 S. Ct. 1467 (1988).

[85] Spannaus v. Department of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987); *see also* Nishnic v. Department of Justice, 671 F. Supp. 776, 788 (D.D.C. 1987) (holding phrase "could reasonably be expected to" to be a more easily satisfied standard than "likely to materialize").

[86] *See e.g.*, Allen v. Department of Defense, 658 F. Supp. 15, 23 (D.D.C. 1986) (holding amendment to have created a "broader category of information that is protectible" under this exemption).

[87] Exemption 7(D) now exempts from mandatory disclosure all law enforcement records or information which
could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority or by an agency conducting a lawful national security investigation, information furnished by a confidential source.
5 U.S.C. § 552(b)(7)(D) (Supp. IV 1986).

[88] *See, e.g.*, Baez v. Department of Justice, 647 F.2d 1328, 1340 (D.C. Cir. 1980) ("state, local and foreign law enforcement authorities" held to qualify as confidential sources); Founding Church of Scientology v. Levi, 579 F. Supp. 1060, 1063 (D.D.C 1982) ("commercial institutions" held to qualify as confidential sources), *aff'd per curium*, 721 F.2d 828, (D.C. Cir. 1983). *Contra* Katz v. Department of Justice, 498 F. Supp. 177, 182–84 (S.D.N.Y. 1979) (state and local non-law enforcement authorities held not to qualify as confidential sources); Ferguson v. Kelley, 455 F. Supp. 324, 326–27 (N.D. Ill. 1978) (corporations and credit bureaus held not to qualify as confidential sources).

[89] *Accord* Shaw v. FBI, 749 F.2d 58, 61–62 (D.C. Cir. 1984); Radowich v. United States Attorney, District of Maryland, 658 F.2d 957, 964 (4th Cir. 1981).

[90] Exemption 7(E) now exempts from mandatory disclosure law enforcement records or information which "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of law." 5 U.S.C. § 552(b)(7)(E) (Supp. IV 1986).

[91] For an example of just such a record held not to be entitled to protection under Exemption 7(E) prior to the passage of the FOIA Reform Act, see Sladek v. Bensinger, 605 F.2d 899, 903 (5th Cir. 1979) (DEA Agent's Manual).

prosecutions if their disclosure could reasonably be expected to risk circumvention of law. This clause would now permit the withholding of the type of record ordered disclosed in *Jordan v. Department of Justice.*[92]

The third subpart of Exemption 7 that was substantively amended, Exemption 7(F), has been modified to expand its coverage to all individuals, rather than being limited to "law enforcement personnel."[93] Agencies can now withhold all law enforcement information that could reasonably be expected to endanger the physical safety of any individual if the information were disclosed.

Exclusions

Establishing a completely unique type of protection for certain exceptionally sensitive law enforcement records, the FOIA Reform Act created a new subsection that entirely excludes three narrowly prescribed categories of records from the coverage of the FOIA.[94] Agencies can now respond to requests for excluded records as if they did not exist. The Department of Defense Directive states that if records are properly excluded, "the response to the requester will state that *no records* were found."[95] The exclusion provisions should not be confused with the practice of refusing to confirm or deny, based on a specified exemption (most frequently Exemption 1 or Exemption 7(c)), that records within the scope of a particular request exist.[96] The exclusion provisions were enacted, because in some circumstances, refusing to confirm or deny whether requested records exist is insufficient; such a response would be inappropriate for certain broad categories of requests.

Subsection (c)(1) permits an agency to affirmatively deny that it has responsive records if acknowledging the fact that the agency has records within the scope of the request would inform the subject of a criminal investigation that an investigation was ongoing, and if such acknowledgement could reasonably be expected to interfere with the investigation. Quite logically, this extraordinary response can be employed only during the pendency of the investigation and only so long as the agency reasonably believes that the subject is unaware of the investigation.

Subsection (c)(2) applies only to third-party requests to criminal law enforcement agencies seeking to identify whether a particular individual is a confidential source. Subsection (c)(3) is of no direct significance to the Department of Defense in that it applies only to a narrow category of classified records maintained by the Federal Bureau of Investigation.

Conclusion

The Freedom of Information Reform Act of 1986 caused significant and extensive changes in the process by which agencies compute fees and make fee waiver determinations, and afforded greater exemption and exclusion protections for law enforcement records. Quite appropriately, these changes now require commercial requesters to bear the often extensive review costs associated with the processing of their requests. The political trade-offs for this greater protection include new fee provisions that divide requesters into three categories, each with its own particular fees and minimum fee levels. Only by consulting DOD Regulation 5400.7–R, the services' implementation thereof, and the developing case law, can judge advocates be assured that their advice takes into account the subtle distinctions and complex procedures now required to make fee and fee waiver determinations.

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[92] 591 F.2d 753, 771 (D.C. Cir. 1978) (en banc) (guidelines for criminal prosecution and pre-trial diversion). The extent to which *Jordan* still required disclosure of such records after the D.C. Circuit's decision in Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), is open to question. *Compare* 670 F.2d at 1053 (opinion of the court) *with* 670 F.2d 1090–92 (Ginsberg, J., concurring) *and* 670 F.2d at 1117–18 (Wilkey, J., dissenting).

[93] Exemption 7(F) now exempts from mandatory disclosure law enforcement records or information which "could reasonably be expected to endanger the life or physical safety or any individual." 5 U.S.C. § 552(b)(7)(F) (Supp. IV 1986).

[94] Subsection (c) provides that

> (1) Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—
>
> (A) the investigation or proceeding involves a possible violation of criminal law; and
>
> (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.
>
> (2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.
>
> (3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

5 U.S.C. § 522(c) (Supp. IV 1986).

[95] DOD Reg. 5400.7–R, paras. 3–200, *Number* 7 e.1. and 2. (Emphasis in the original.) In both subparagraphs 1 and 2, the Regulation incorrectly states that excluded records may be treated "as not subject to exemption number 7." Of course, what they should have provided is that such records may be treated as not subject to the Freedom of Information Act.

[96] The practice of refusing to confirm or deny whether any records exist within the scope of a particular request is often referred to as "Glomarization," based on its use in Phillipi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), in response to a request for records pertaining to then-classified CIA records indicating that Howard Hughes's *Glomar Explorer* submarine-retrieval ship was being used by the CIA.

The Threat of Criminal Sanctions in Civil Matters: An Ethical Morass

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You are the legal assistance officer at Camp Swampy, and you represent Sergeant Jones, whose wife is seeking monthly support payments from him. Sergeant Jones has just given you a letter that he recently received from his wife's legal assistance officer. The letter reads in part as follows:

> *You are receiving substantial BAQ each month. This money is specifically provided to you by law and regulation to be used in the support of your dependents on a regular monthly basis. Failure to so use this entitlement constitutes fraud and a gross dereliction of your marital responsibilities. Accordingly, you may be court-martialed under the Uniform Code of Military Justice for the wrongful failure to support your dependents. . . .* [1]

You perceive this letter as a possible threat to pursue criminal charges solely to gain advantage in a civil matter. You recall that under the American Bar Association (ABA) Code of Professional Responsibility such conduct would be unethical. As a member of the Army Judge Advocate General's Corps, what are your ethical responsibilities in such a situation? Does the letter constitute unethical conduct by the other legal assistance officer?

Introduction

Eighty years ago the ABA promulgated its first ethical rules, the Canons of Professional Ethics.[2] The 1969 Model Code of Professional Responsibility[3] and subsequent revisions retained the standards set out in the Canons of 1908.[4] One such standard was Disciplinary Rule (DR) 7–105, which prohibited a lawyer from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter.[5]

The new ABA Model Rules of Professional Conduct[6] and the Army's Rules of Professional Conduct for Lawyers[7] contain no such express provision. Moreover, the commentary and the legislative history of the Model Rules are devoid of any explanation for the omission of the rule.[8] This lack of explanation makes it difficult to determine whether the omission was deliberate or inadvertent.

In exploring this issue, it is necessary to determine whether the ABA (and subsequently the Army), by omitting the former rule, has abandoned its position with respect to that standard of professional conduct. If the omission was deliberate, then no other provision of the Model Rules should be applied to prohibit the conduct previously addressed by DR 7–105. If the omission was inadvertent, the question is whether other provisions in the rule address the same conduct.

It can certainly be argued that the ABA intentionally deleted the provision. The ABA worked on the Model Rules for years. It seems highly unlikely that the commission would inadvertently delete such an important provision. On the other hand, it is dangerous to "assume" that the ABA intentionally abandoned this rule of professional conduct. As the commentary seems to suggest, Model Rule (and Army Rule) 4.4, which prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person, may well encompass the proscription against threatening criminal sanctions in civil matters.[9] At least one state ethics opinion held that the failure to incorporate a provision like DR 7–105 into the state ethics rules was unintentional and the substance of DR 7–105 remained in effect.[10]

In determining whether the standard articulated in DR 7–105 remains intact or is modified to some extent by the Model Rules and Army Rules, we must turn to an analysis of the former rule. We can then attempt to understand how that rule has been applied in the past and how the standard, whether articulated in a parallel provision of a jurisdiction's rules or incorporated through interpretation of another provision of the Model Rules and Army Rules, is likely to be applied in the future.

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[1] This excerpt is taken from an actual letter written by a legal assistance officer to a soldier. The letter subsequently became the subject of an OTJAG Professional Responsibility Opinion, *reprinted in* The Army Lawyer, May 1977, at 19. It was determined that the letter violated DR 7–105 of the ABA Code of Professional Responsibility, which prohibits a lawyer from threatening criminal action solely to gain an advantage in a civil matter.

[2] Canons of Professional Ethics (1908).

[3] Model Code of Professional Responsibility (1969).

[4] American Bar Association, Preface to Model Code of Professional Responsibility (1980) at 1.

[5] Model Code of Professional Responsibility DR 7–105(A) (1980) (as there is no subdivision other than (A) to DR 7–105, the rule will appear merely as DR 7–105 throughout this paper). *See also* Model Code of Professional Responsibility EC 7–21.

[6] Model Rules of Professional Conduct (1984) [hereinafter Model Rules].

[7] Dep't of Army, Pam. 27–26, Rules of Professional Conduct for Lawyers (Dec. 1987) [hereinafter Army Rules].

[8] ABA/BNA Lawyer's Manual on Professional Conduct 71:601 (1987) [hereinafter ABA/BNA Lawyer's Manual]; ABA, Legislative History of the Model Rules of Professional Conduct 151 (1987). In the ethics column of the American Bar Association Journal, Mr. George Kuhlman, the ethics counsel for the ABA's Center for Professional Responsibility in Chicago, Illinois, stated that the restriction was dropped because it was unenforceable. "The rule could be invoked only when action was taken *solely* to gain a civil advantage. More important, there were certain instances when this sort of bargaining was not thought to run counter to public policy, provided the civil aspect of the matter was remedied." Kuhlman, *The Right Choice*, 73 A.B.A.J. 120 (Nov. 1, 1987).

[9] ABA/BNA Lawyer's Manual, supra, at 71:601. Model Rule 4.4 states: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

[10] N.J. Advisory Committee on Professional Ethics, Op. 595 (1986).

Purpose of DR 7–105

Historically, the standard set out in DR 7–105 has been the source of much confusion.[11] A survey of ethics committee opinions and court decisions reveals that there is little agreement about the precise meaning of the rule[12] and that while some jurisdictions have appeared to narrow its meaning as much as possible,[13] others have expanded it to include a proscription against bringing collateral administrative sanctions to bear on a pending civil matter.[14]

In addition to DR 7–105, the old Model Code of Professional Responsibility also contained Ethical Consideration (EC) 7–21, which explained:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process, further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.[15]

Furthermore, the Preambles to the Model Rules and the Army Rules both contain language charging lawyers to use the legal processes only for legitimate purposes.[16] While these concerns stem from a desire for fundamental fairness in the settlement or adjudication of civil disputes, the express language of DR 7–105 ("solely to obtain an advantage in a civil matter") implies an attempt to gain unfair advantage. Courts have typically referred to the concept of "fair play" in discussing this rule.[17] Of considerable concern is the problem of public officials and prosecutors abusing their positions or discretion.[18] It is also possible that genuine conflicts of interest can arise when an attorney representing a client in a civil suit undertakes to "advise" an adverse party of possible consequences or to "suggest" a course of action to avoid criminal consequences. In such cases, the adverse party can be misled into believing that he or she is receiving legitimate legal advice.

Yet, the hallowed language of literally hundreds of ethics committee and state court opinions seems to beg the essential questions: What constitutes action designed "solely" to gain advantage in a civil matter?[19] Is every advantage prohibited? What are the "legitimate" or "lawfully intended purposes" of the law's procedures? How does the rule protect the public and the integrity of the administration of justice when an attorney is prohibited from reporting criminal wrongdoing?[20]

In this litigious age it is apparent that the civil adjudicative process can be used for the protection of society at large. Class action suits, environmental litigation, the use of consent decrees in consumer and trade litigation, and civil rights lawsuits all serve the interests of society at large as much as the criminal process does. In the criminal arena it is not uncommon for a prosecutor to exercise discretion and decline prosecution in certain cases, particularly when confronted with a reluctant or uncooperative witness. Thus, the rationale against using the civil and criminal processes in the same context has been weakened. It is often in society's best interest, for example, to settle major contract, tax, and other commercial disputes through the plea bargaining of various criminal charges.

In examining the purpose of the rule and its application to various cases, two definitive statements are possible. First, in a civil dispute where no crime has been committed and the threat of criminal sanctions nevertheless exists, the target of the threat or criminal charge has a criminal remedy, because the opposing party probably has filed a false statement or otherwise has fraudulently commenced criminal proceedings. Second, in a civil dispute, a putative loser who threatens or institutes criminal sanctions to coerce an outcome that otherwise cannot be legally obtained has probably committed extortion. A classic example of this would be the filing of legitimate criminal charges on unrelated matters solely to coerce a settlement or payment to which one has no legitimate legal claim whatsoever.

To the extent our legal system can prevent or at least remedy these two extremes, an ethical rule of the sort contained in DR 7–105 adds little to the process. It is the vast gray area between those two extremes, however, that has caused much consternation, litigation, and reprobation. The central question underlying the debate is: Where there exists probable cause to believe a civil litigant has committed a crime (particularly a crime related to the pending civil matter), why is it improper or unfair to use this fact in negotiations concerning the civil matter? Forcing an adversary to make a difficult choice is not inherently unethical. What renders it unethical to use the criminal process to enforce a clear civil right (where the facts plainly support assertions of criminal wrongdoing and civil liability)?

Within the bounds of the "vast gray area" delineated above there is little agreement with respect to the meaning and extent of DR 7–105. Its omission from the Model Rules and the Army Rules no doubt will compound the confusion as the legal community struggles to interpret the

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[11] *See, e.g.*, Annotation, Counsel's Threat to Prosecute, 42 A.L.R. 4th 1000.

[12] *Compare, e.g.*, Wis. State Bar Committee on Professional Ethics, Formal Op. E–87–5 (1987) *with* Decato's Case, 117 N.H. 885, 379 A.2d 825 (1977).

[13] *See, e.g.*, Ala. State Bar General Counsel, Op. 84–96 (1984).

[14] *See, e.g.*, Cal. State Bar Standing Committee on Professional Responsibility and Conduct, Op. 1983–73 (1983).

[15] Model Code of Professional Responsibility EC 7–21 (1969).

[16] Model Rules at 9; Army Rules at 2.

[17] See *In re* Lewelling, No. SC–S30014 (Or. Sup. Ct. April 3, 1984).

[18] *See, e.g.*, Annotation, Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as a Prosecuting Attorney, 10 A.L.R. 4th 605.

[19] *See, e.g.*, Iowa State Bar Association v. Michelson, 345 N.E.2d 112 (Iowa 1984); People *ex. rel.* Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979); Decato's Case, 117 N.H. 885, 379 A.2d 825 (1977); Va. State Bar Standing Committee on Legal Ethics, Op. 782 (1986).

[20] *See,* N.J. Advisory Committee on Professional Ethics, Op. 551 (1985); *see also* N.J. Advisory Committee on Professional Ethics, Op. 595 (1986).

language of Model Rule 4.4: "[A] lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. . . ."

Scope and Application

From the published cases and ethics opinions, common factors emerge upon which the analysis turns. Those factors include: the individual who is invoking criminal sanctions or the threat thereof (attorney or client); the type of information conveyed (a threat to prosecute or a simple statement of objective facts); its timing (when the information is conveyed); and the recipient (an opponent or relevant authorities). Missing from this list is any reference to truth or any good faith belief in the allegations of criminal wrongdoing. There are few decisions in which such a defense is discussed, but those holdings are unequivocal. One ABA opinion dismissed outright any consideration of truth with respect to the offending lawyer's allegations: "Our view is not based on or altered by any consideration of whether or not the lawyer may be correct. . . ."[21] In the case of *In re Vollintine*[22] the court determined that the good faith of counsel was not an acceptable defense to an action under DR 7–105.

Of primary concern to judge advocates are the cases that focus on the conduct of prosecutors. Here, the concern is on the ostensibly improper blending of the government's civil and criminal interests, and not on cases in which public officials improperly use their offices for personal gain or private advantage. The prevailing view from the reported cases seems to be that prosecutors cannot negotiate in an attempt to satisfy collateral governmental interests. Thus, a district attorney cannot bargain to dismiss criminal charges in exchange for a defendant's release of county officials in a civil rights action arising from the same incident.[23] Nor may a city attorney request that the prosecutor demand that a criminal defendant release government agencies from civil liability in exchange for charging or sentencing concessions.[24]

Whether given conduct is permissible sometimes depends on whether the attorney or the client takes the action. The lead ABA opinion[25] states that a law firm may ethically continue civil litigation while assisting clients in presenting the facts to prosecutors for such action as they deem appropriate, provided the firm does not threaten criminal prosecution. Illinois appears to have the same standard, *i.e.*, attorneys may assist their clients in providing information to authorities, but the attorneys cannot do it themselves.[26] In Wisconsin and Alabama, the attorney can report criminal wrongdoing to the prosecutor, as long as no threats occur.[27] Indeed, Alabama Ethics Opinion 84–96[28] states that an attorney *must* report the crimes of an opponent, provided that: 1) the characterization/determination of criminal wrongdoing is not really questionable; 2) the prosecutor does not abuse his or her official position; 3) there is no threat or negotiation of a *quid pro quo;* and 4) the report of criminal misconduct is not merely a collection device in a civil dispute. To not report criminal wrongdoing may account to misprision of a felony, itself a criminal offense. As it is improper for an attorney to threaten or refer in correspondence to criminal sanctions (in some jurisdictions), it is also improper to advise the client to do so.[29] Finally, an attorney cannot seek accord and satisfaction from a criminal defendant in exchange for dismissal of pending charges.[30]

Some jurisdictions are rather liberal in their interpretation of what constitutes a threat in communications with an opposing party. In Alabama, an attorney can refer to the relevant criminal offense and even quote the statute in a collection letter, as long as there are no explicit threats or demands for payment[31] (but one might ask how effective a collection letter can be if there is no demand for payment).

In *Decato's Case*[32] an attorney wrote a letter asking why a stop payment order had been issued on a check. He added that unless he received such information, he would consider filing criminal charges. The court reasoned that the reference to possible criminal charges was not designed "solely" to gain a civil advantage. As the lawyer merely was requesting more information and informing the opposing party of possible criminal action without overt threats, there was no violation of the ethical rule. The court suggested that the ethical rule seeks to prevent deception and overreaching, and that the rule was therefore not violated in this case.

After referring to criminal offenses and possible penalties, including fine and imprisonment, the attorney in *In re McCurdy*[33] added that "I am not telling you this to threaten you." The court was satisfied that this disclaimer precluded a violation of the ethical rule.

In Utah a statute requires that a dishonored check notice contain a reference to the applicable criminal statute. Thus, an attorney complying with this requirement does not violate any ethical rule.[34] By contrast, reference to a criminal offense and a statement that the client "may well have to

[21] ABA Committee on Ethics and Professional Responsibility, Informal Op. 1427 (1978).

[22] 673 P.2d 755 (Alaska 1983).

[23] Or. State Bar Legal Ethics Committee, Op. 483 (1983).

[24] Colo. Bar Association Ethics Committee, Op. 62 (1982).

[25] ABA Committee on Ethics and Professional Responsibility, Informal Op. 1484 (1981).

[26] Ill. State Bar Association committee on Professional Ethics, Op. 86–9 (1986). *But see* N.J. Advisory Committee on Professional Ethics, Op. 551 (1985).

[27] Wis. State Bar Committee on Professional Ethics, Formal Op. E–87–5 (1987); Ala. State Bar General Counsel, Op. 83–84 (1983).

[28] Ala. State Bar General Counsel, Op. 84–96 (1984).

[29] N.M. State Bar Advisory Opinions Committee, Op. 1987–5 (1987).

[30] Va. State Bar Standing Committee on Legal Ethics, Op. 547 (1984).

[31] Ala. State Bar General Counsel, Op. 86–121 (1986) and Op. 82–580 (1982).

[32] 117 N.H. 885, 379 A.2d 825 (1977).

[33] 297 Or. 217, 681 P.2d 131 (1984).

[34] Utah State Bar Ethics Committee, Op. 71 (1979); *see also* Ohio State Bar Association Committee on Legal Ethics and Professional Conduct, Informal Op. 87–9 (1987).

resort to criminal process" constituted an indirect threat and therefore violated Vermont's rule.[35]

Applying the language of Model Rule 4.4, the authors of New Jersey Ethics Opinion 551[36] declared that an attorney cannot ethically inform authorities that an opponent in a civil matter has violated a criminal statute. Such action must await the conclusion of the civil proceedings, because an attorney is precluded from taking action if the "substantial purpose" of the action is to embarrass, delay, or burden a third person. Yet, as noted above, Alabama apparently requires such reporting in many cases.[37]

While the discussion above highlights the many differences in how the rule is interpreted, including distinctions with respect to communications to the opposing party and to the authorities,[38] one case arguably promotes consensus. In *Iowa Bar Association v. Michelson*[39] the offending attorney wrote numerous collection letters to a military debtor, threatening to seek criminal prosecution even though the attorney knew that the county attorney already had declined prosecution. Additionally, the attorney wrote a letter to the debtor's commanding officer. The court determined that this conduct violated both DR 7–105 and DR 7–102(A), which proscribes conduct that would harass or maliciously injure another. The court found that the attorney was "volatile" and had been admonished for intemperate conduct, but that he had not acted maliciously or in bad faith.[40] The court then substituted a reprimand for the 90-day suspension recommended by the grievance commission.

One other area requires examination. Threats against third parties in civil actions occasionally violate the standard of DR 7–105. Thus, threats to an administrative board,[41] threats of retaliatory charges against witnesses in an attorney discipline case,[42] threats of criminal prosecution against an opposing attorney,[43] and threats of disciplinary action against an opposing attorney[44] all violate DR 7–105. A threat to move for sanctions under Rule 11, Federal Rules of Civil Procedure,[45] does not violate the Virginia standard, as the Virginia code apparently proscribes only the threat of criminal sanctions and "disciplinary action" against opposing attorneys.[46] From these cases it appears not only that some jurisdictions are expanding the applicability of DR 7–105 to include noncriminal threats (as in California's rule that prohibits the threat of collateral administrative proceedings),[47] but that some members of the legal profession are less than shy about the use of threat tactics against other lawyers.

The Ideal and the Real: A Rational Compromise

Resort to criminal process in a civil matter is a volatile undertaking. The principle underlying DR 7–105 is well established and apparently well understood; a civil litigant should not benefit from deceit, overreaching, or other *unfair* advantage by resort to criminal sanctions. Applying such a principle, however, has proved to be as imprecise an endeavor as predicting stock market performance.[48]

Perhaps a few useful distinctions can be drawn to make the general proscription of DR 7–105 clearer and more meaningful. It is apparent that all jurisdictions agree on the basic premise underlying the rule, but that few agree on the value of a rule that is so strictly construed that it prohibits reporting criminal misconduct to appropriate authorities. If some basic distinctions are agreed upon, a more narrowly drawn standard than is now contained in Model Rule 4.4 should be considered. At a minimum, the rule cries out for further guidance and a recognition that there are legitimate means of addressing criminal interests in civil matters.

The first distinction that must be made is that the rule should consider the role of the particular attorney whose conduct is in question. Public officials, such as prosecutors, have fundamentally different interests at stake than do private practitioners. Although the court in *MacDonald v. Musick*[49] opined that it could see no difference between public prosecutors and other lawyers,[50] not all cases involving "unethical conduct" on the part of a prosecutor violate basic notions of fairness. Most reported cases concerning prosecutors or other public officials involve some conflict or potential conflict of interest between the duty to prosecute crime and the perceived parallel duty to protect government agencies and employees from civil liability. But what interests are compromised or in conflict when a prosecutor seeks restitution for a crime victim in exchange for lenient

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[35] Vt. Bar Association Committee on Professional Responsibility, Op. 82–10 (1984).

[36] N.J. Advisory Committee on Professional Ethics, Op. 551 (1985).

[37] Ala. State Bar General Counsel, Op. 84–96 (1984).

[38] *Compare, e.g.*, N.M. State Bar Advisory Opinions Committee, Op. 1987–5 (1987) (attorney can neither send, nor advise client to send, letter containing threats or references to criminal sanctions) *with* Wis. State Bar Committee on Professional Ethics, Formal Op. E–87–5 (1987) (attorney can communicate directly with authorities concerning criminal misconduct of civil opponent).

[39] 345 N.E.2d 112 (Iowa 1984). *See also* OTJAG Professional Ethics Committee Op., *as digested in* The Army Lawyer, May 1977, at 11.

[40] The letter stated that the debtor was facing up to five years in prison, was guilty of a felony, and if criminally prosecuted would be drummed out of the military.

[41] *In re* Mezzacca, 67 N.J. 387, 340 A.2d 658 (1975).

[42] *In re* Madsen, 68 Ill.2d 472, 370 N.E.2d 199 (1977).

[43] Michigan State Bar Committee on Professional and Judicial Ethics, Informal Op. CI–578 (1983).

[44] Ind. State Bar Association Legal Ethics Committee, Op. 10 (1985); Ky. Bar Association Ethics Committee, Op. E–265 (undated).

[45] Fed. R. Civ. P. 11 provides for sanctions against a party or his representative for signing pleadings, motions, or other papers in violation of the rule, which deems signature a certification as to accuracy, basis of knowledge, etc.

[46] Va. State Bar Standing Committee on Legal Ethics, Op. 760 (1986).

[47] Cal. State Bar Standing Committee on Professional Responsibility and Conduct, Op. 1983–73 (1983).

[48] An activity, like presidential elections and the world series, in which "predictions" become infinitely more accurate with hindsight.

[49] 425 F.2d 373 (9th Cir.), cert. denied, 400 U.S. 852 (1970).

[50] Here, the prosecutor filed drunk driving and resisting arrest charges to forestall a potential civil rights suit by the defendant against the police officers who had arrested him.

treatment of the defendant? Such bargaining occurs routinely, yet it appears to violate the ethical rule. If it is appropriate for the prosecutor to engage in such discussion, why is it inappropriate for the private practitioner representing a crime victim to do the same? If a prosecutor with a permissible motive (protecting the public at large and the crime victim) can ethically "link" criminal and civil concerns, perhaps the private practitioner who seeks a settlement for a crime victim-client also serves the interests of society by resolving disputes through negotiation and early disposition of criminal cases.

The second distinction to be made concerns the criminal wrongdoing itself: Is it related to or does it arise out of the civil matter at issue, or is it wholly unrelated? A better case exists for finding the former circumstance appropriate for negotiation or action; the latter case too easily lends itself to extortion. Yet, in a clear case of civil liability, some societal interest is served by settlement out of court, even if settlement is induced by the prospect of criminal sanctions. A key inquiry ought to be: How serious or pervasive is the criminal misconduct? Would it really warrant prosecution?

A third distinction must be made with regard to the opponent. An unrepresented opponent must be treated differently than an opponent's attorney. Lawyers must eschew heavyhanded tactics and avoid the perception that the attorney is giving legal advice to the unrepresented opponent.

Finally, the language of DR 7–105 and its apparent successor, Rule 4.4 must be reviewed. Conceptually, "sole purpose" has become "substantial purpose," and the focus has shifted from gaining advantage in a civil matter to embarrassing, delaying, or burdening a third party. Arguably, any conduct or statement referring to collateral events or facts could be construed as violating the new rule. Is the rule designed to chill good faith bargaining and negotiation? Presumably not, but what are its bounds? Litigation itself burdens a third party (the opponent). What actions have "no substantial purpose" other than to burden a third party?

Under the broad language of Rule 4.4 ("embarrass, delay, or burden"), settlement of a legitimate civil dispute could be both a substantial purpose in linking criminal and civil matters and a burden to the opponent. Although Rule 4.4 is violated only if the action has no substantial purpose other than to burden the opponent, the history of DR 7–105 suggests that settlement of a civil dispute will not be deemed a legitimate purpose for linking civil and criminal matters. Therefore, it is conceivable that Rule 4.4 will be interpreted so broadly that any action purporting to link a criminal interest with a civil one—no matter how well-intentioned, factually supported, or legally sound—will be deemed unethical. If this is not the result intended by the drafters and the rule's proponents, it is time to publish definitive guidance. If this is the intended result, it is time to change the rule itself.

The need for consensus about a workable rule is evident, particularly for a rule that could affect federal prosecutors and other federal attorneys in so many diverse ways. First, the legal community must recognize that good faith settlement of disputes through negotiation is healthy for the legal system and society as a whole. Next, it also must recognize that whether explicit or tacit, negotiation of civil and criminal claims in the same context is a fact of life and is not inherently evil. We must focus on preventing the real evil—deceit and over-reaching—instead of baldly asserting, as have some jurisdictions, that any linkage of criminal and civil interests is *per se* unethical.

In considering a change to DR 7–105 and Rule 4.4, we should build on the following premises:

—lawyers must have a good faith belief in their clients' causes and in the truth of any criminal allegations against their opponents.

—both the civil and the criminal claims must have merit.

—the criminal allegations must be directly related to the civil matter.

—in representing a client in such matters, an attorney should be permitted to do the same things that he or she is permitted to assist the client to do.

—the linkage of the criminal matter must pertain to the opponent's conduct only, and not that of the opponent's attorney.

—if overt threats are impermissible, veiled threats also are impermissible.

—a *quid pro quo* is sometimes permissible (*e.g.*, in a case of restitution to a crime victim).

With these considerations in mind, I propose the following addition to Model Rule 4.4 to provide for linkage of criminal and civil matters in specific circumstances:

> Nevertheless, in advancing a good faith position in a civil matter, a lawyer shall be permitted to discuss with a party-opponent's attorney potential disposition of criminal allegations directly related to the civil matter. To be proper, such discussion or negotiation must be based on good faith belief in the truth of the related criminal allegations. Moreover, in no case may an attorney representing a party in a civil matter actually influence or represent that he or she can influence the disposition of criminal allegations in a manner other than one generally available to all citizens. For example, an attorney may recommend to the client that no criminal complaint be filed or that the client testify favorably; the attorney may recommend disposition to the criminal authorities or the attorney may take other appropriate action. In no case may an attorney agree, in exchange for favorable resolution of the civil matter, to ignore or remain silent about continuing criminal activity on the part of the party-opponent.

No doubt this proposed modification of the rule can itself be refined as experience and developing case law warrant. Nevertheless, it contains the basic framework and elements of a workable standard, *i.e.*, one that recognizes the complex nature of many legal problems and the realities of satisfying overlapping interests and settling disputes. Moreover, it acknowledges that there are cases in which resolution of related civil and criminal matters is mutually advantageous to the client, the legal system, and society.

Conclusion

While the Army has adopted the Model Rules largely intact, not all jurisdictions have done so. Some have retained their versions of the ABA Model Code, including DR

7–105. Others have incorporated a provision like DR 7–105 into their versions of the Model Rules.

Judge advocates are primarily subject to the Army Rules, but some states are asserting jurisdiction in ethical matters even though the attorneys are not members of the local bar and the proceedings are in a federal forum. This should be of paramount concern to those judge advocates whose practice of law takes them into the civilian arena, or has the potential to do so.

With the history of DR 7–105, the lack of commentary to explain omission of a similar express provision, and the precious little guidance regarding the meaning and extent of Rule 4.4, organized confusion and disagreement have been transformed into genuine chaos.

The rule proposed herein recognizes that there are legitimate circumstances in which linkage of criminal and civil interests in the same context is legally sound and ethically proper. The pragmatic result is an express distinction between deceit and overreaching, on the one hand, and attainment of legitimate private and societal goals, on the other. Lawyers and the public benefit from rules based on reasonable distinctions and sound policy, rather than ones based on vague notions of public perceptions and a dated view of the limited role of civil litigation in our society. Moreover, a public confidence in our legal system is enhanced not by lawyers engaging in legal fiction and hair-splitting, but by lawyers engaging problems, analyzing them using well-reasoned rules and sound policy, and solving them. A meaningful and workable rule as discussed herein is critical to the profession and the public it serves.

Revising the War Powers Resolution: A Wrong Answer

Captain Keith D. Simmons (USAR)

Introduction

At a May 19, 1988 press conference, Senator George Mitchell stated that the War Powers Resolution,[1] enacted in 1973 to ensure that United States Armed Forces would not become involved in hostilities outside the United States without congressional approval,[2] had "obviously failed."[3] Succinctly summing up Congress's fifteen years of experience with the Resolution, he said, "We have spent countless hours proposing, filibustering, and debating measures to invoke a law, rather than assessing the wisdom of the policy that prompted the deployment of forces."[4] That day, Senator Mitchell, together with then-Senate majority leader Robert Byrd, and Senators Sam Nunn and John Warner, the chairman and ranking minority member of the Armed Services Committee, proposed a complete revision, entitled the "War Powers Resolution Amendments of 1988."[5]

The concession by a partisan group of Senate leaders that the War Powers Resolution—also called the War Powers Act—is unworkable in its present form marked a turning point in the debate over the constitutionality of the Resolution and its national security implications. The debate had been going on among the members of the legislative branch and between the executive and legislative branches since 1973. President Nixon vetoed the Resolution on constitutional grounds,[6] and although Congress overrode Nixon's veto in the wake of the Vietnam war, none of Nixon's successors has recognized the Resolution as constitutional.[7]

More significantly, no President has acted as if he were bound by the Resolution's requirements, principally sections 3, 4, and 5.[8] Sections 3 and 4 require the President to consult with Congress before introducing U.S. military forces into actual or potential conflict and to justify his action, in writing, within forty-eight hours. Section 5[9] directs the President to remove U.S. forces within sixty days or any shorter period Congress may set by concurrent resolution, unless Congress has declared war or expressly authorized

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[1] 50 U.S.C. §§ 1541–48 (1982).

[2] *See* 50 U.S.C. § 1541(a) (1982); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). For a detailed discussion of the War Powers Resolution's historical background and the political climate in which it was enacted, see Cruden, *The War-Making Process*, 69 Mil. L. Rev. 35 (1975).

[3] *Senate Hopes to Overhaul War Powers Act*, Washington Times, May 20, 1988, at A6, col. 1.

[4] *War Powers Overhaul Proposed*, Washington Post, May 20, 1988, at A1, col 2.

[5] S.J. Res. 323, 100th Cong., 2d Sess. (1988) [hereinafter Amendments]. The Amendments received committee hearings in the Senate, but no action prior to adjournment of the 100th Congress.

[6] The President warned that the War Powers Resolution would "take away, by mere legislative act, authority which the President has properly exercised for more than 200 years." Veto of War Powers Resolution, 9 Weekly Comp. Pres. Doc. 1285, 1286 (Oct. 24, 1973). *See also infra* notes 25–27 and accompanying text.

[7] *E.g.*, Statement of White House spokesman Roman Popaduik: "[L]ike all previous administrations, this administration considers the War Powers Act unconstitutional." (quoted in *Senate Hopes to Overhaul War Powers Act*, *supra* note 4).

[8] 50 U.S.C. §§ 1542, 1543 (1982).

[9] 50 U.S.C. § 1544 (1982).

their use.[10] Beginning with the military flights over Cambodia in 1974—the first situation to which the Resolution was alleged by some to apply—up to the current operations in the Persian Gulf, ongoing since June 1987, no President has complied fully with the Resolution's consultation and reporting requirements, sought congressional approval of the deployment, or withdrawn U.S. forces for lack of congressional approval.[11]

Presidential disdain for the War Powers Resolution, however, has not resulted in a determined congressional response. As Senator Mitchell put it, Congress has proposed, filibustered, and debated measures to invoke[12] the Resolution, but has never—with one exception—agreed whether the Resolution applied to a particular deployment of U.S. forces, and if so, whether Congress should approve the deployment or require withdrawal.[13] The Presidential view, that the Resolution unconstitutionally infringes on powers belonging to the executive branch, has had significant support among members of Congress. Other members, while not necessarily conceding the constitutional arguments, have agreed that the President should not be required to withdraw U.S. forces from a hostile situation at the end of the Resolution's arbitrary sixty-day deadline, with no regard for national security considerations. On June 6, 1988 the Senate tabled a proposal to invoke the Resolution in connection with the Persian Gulf operations, for precisely this reason.[14] Frustrated with congressional inaction, individual members opposed to particular deployments of U.S. forces have brought a series of suits seeking Presidential compliance with the Resolution through judicial decree, but have found no court willing to hear the merits of their claims.[15]

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[10] 50 U.S.C. § 1544(b) (1982). Section 5 allows for a single, 30-day extension if the President certifies in writing that the extension is necessary for the safety of the military forces, but even within the 60-day period or any extension, Congress may direct the removal of the U.S. forces by a concurrent resolution that is not presented to the President for his signature or veto. *But see infra* notes 25–27 and accompanying text.

[11] Section 3 of the Resolution directs the President to consult with Congress in every possible instance before introducing U.S. forces into actual or threatened hostilities. 50 U.S.C. § 1542 (1982). The Resolution's section 4 reporting requirements, which in turn trigger the 60-day time period for withdrawal of U.S. forces if Congress has not approved the deployment, apply when U.S. forces are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, into the territory, airspace or waters of a foreign nation while equipped for combat (except for supply, replacement, repair or training), or in numbers which substantially enlarge forces equipped for combat already located in a foreign nation. 50 U.S.C. § 1543(a) (1982). Situations in which U.S. military personnel have been involved by Presidential decision, and to which the Resolution has been alleged to apply (at least by some members of Congress or the media) include the military flights over Cambodia and the evacuation of Cyprus in 1974; the DaNang evacuation, the Phnom Penh evacuation, the Saigon evacuation, and the *Mayaquez* rescue, all in 1975; the military evacuation of U.S. nationals from Lebanon and a tree-cutting incident in the Korean Demilitarized Zone in which two American officers were killed, both in 1976; the 1978 airlift of foreign troops and supplies to Zaire; the Iranian hostage rescue mission in 1980; the participation of U.S. forces in the Sinai Multinational Peacekeeping Force, and the presence of 56 U.S. military advisers in El Salvador, both in 1982; the deployment of U.S. Marines as part of the Multinational Force in Lebanon, the deployment of F-15 aircraft to Chad during the Libyan invasion of that country, and the liberation of Granada, all in 1983; self-defense measures taken in the Gulf of Sidra against Libyan forces and the air strikes against Libya in 1986; and the current operations in the Persian Gulf. Some form of consultation occurred in some of these situations; in others, Presidents Ford, Carter, and Reagan did not consult with Congress in advance, submitted no reports, or submitted reports "consistent with the War Powers Resolution" which did not concede the Resolution's applicability. In no case has a President made a report under the Resolution *per se*. *See The War Powers Resolution: A Special Study of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 173–251 (1982).

[12] In one sense, discussion of whether to "invoke" the War Powers Resolution seem anomalous, as the Resolution by its terms does not require congressional action before the President is obligated to make a report. According to section 4(a), 50 U.S.C. § 1543(a) (1982), the President's duty to render a report arises at the time U.S. forces are introduced into actual or threatened hostilities, and is not expressly conditioned on any post-deployment decision on the part of Congress to "invoke" the Resolution. Congress, however, has seldom agreed on the meaning of "hostilities," a term the Resolution does not define. *See, e.g.*, 133 Cong. Rec. 512354–56 (daily ed. Sept. 18, 1987), reporting the dialogue between Senators Hatfield and Quayle on the Persian Gulf operations. Senator Hatfield argued that because attacks had occurred against U.S. forces there, the forces had been introduced into hostilities within the meaning of the Resolution. Senator Quayle disagreed. He viewed the U.S. presence in the Persian Gulf as a peacekeeping operation, one in which the United States had no intent of going to war, and that the Resolution does not apply to a peacekeeping effort by U.S. forces even though the operation involved danger. *See also Crockett* v. *Reagan*, reciting the position of the Reagan Administration that whether a situation warrants a report is left to the President's discretion in the first instance, and in cases of disagreement between the President and Congress, Congress must take action to express its view that the Resolution is applicable. 558 F.Supp. at 900.

[13] The one exception was the Multinational Force in Lebanon Resolution, Pub. L. No. 98–119, 97 Stat. 805 (1983), declaring the War Powers Resolution applicable to the participation of U.S. forces in the multinational force in Lebanon. In that instance, however, Congress accommodated rather than confronted Presidential policy.

[14] The vote in the Senate was 54–31. In moving to table, Senator Byrd argued that the provision (section 5(b)) requiring withdrawal of U.S. forces from a situation solely as a result of congressional inaction made the Resolution unworkable in the context of the Persian Gulf operation. *Senate Blocks Move to Invoke War Powers Resolution*, Washington Post, June 7, 1988, at A11, col. 1.

[15] There have been four such attempts, beginning with *Crockett* v. *Reagan*. Twenty-nine members of Congress alleged that the presence of 56 U.S. military personnel in El Salvador and the provision of military aid to the government of that country violated the Resolution. The district court dismissed the case as presenting nonjusticiable political questions, reasoning in part that the court lacked the means to resolve the factual disputes as to whether the military personnel were involved in hostilities or exposed to imminent hostilities, matters Congress could itself determine by legislative investigation. The district court did state, however, that were Congress to pass a resolution declaring that the situation in El Salvador required a report under the War Powers Resolution and the President submitted none, there would be an issue appropriate for judicial decision. 558 F.Supp. at 899.

The next case, Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985), involved claims by 12 members of Congress and other individuals arising from a war allegedly being conducted against Nicaragua. The congressional plaintiffs advanced legal theories based on the Resolution and the Boland Amendment to the 1983 Department of Defense Appropriations Act, Pub. L. No. 97–377, § 793 (1982), by which the Central Intelligence Agency and Department of Defense were prohibited from using appropriated funds for military activities aimed at overthrowing the government of Nicaragua. The district court dismissed all claims as political questions for essentially the same reasons expressed in *Crockett*. In addition, the court relied on the doctrine of equitable or remedial discretion articulated in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), under which the courts decline to hear the claims of congressional plaintiffs where the plaintiffs' objectives can be accomplished by legislative means.

In Conyers v. Reagan, 578 F.Supp. 324 (D.D.C. 1984), *appeal dismissed*, 765 F.2d 1124 (D.C. Cir. 1985), 11 members of Congress sought a judgment declaring the invasion of Grenada illegal, based in part on the Resolution. Declining to consider the case, the district court noted that some of the plaintiffs had unsuccessfully attempted to initiate congressional action condemning the Grenada operation, and stated, "What is available to these plaintiffs are the institutional remedies afforded to Congress as a body; specifically, The War Powers Resolution [citation omitted], appropriations legislation, independent legislation or even impeachment." 578 F.Supp. at 327.

This record of near-total futility could hardly contrast more sharply with the enthusiasm displayed by proponents of the Resolution at its passage. Then, one commentator, no doubt speaking for many, hailed the Resolution as "reinstat[ing] the symmetry of powers between the branches envisioned by the Constitution."[16] Few seemed to anticipate what would be the actual sequence of events; Presidential disregard for the Resolution, congressional inability to agree whether to invoke its powers under the law, and judicial refusal to accept jurisdiction. With the benefit of fifteen years of experience, however, leading Senators have conceded the Resolution's failure and proposed a complete overhaul of this once-lauded piece of legislation.

The history of failure is reflected in the proposed Amendments' comparatively modest objectives. The emphasis would shift to consultation. The President would no longer be required to withdraw U.S. forces from a hostile situation merely as a result of congressional inaction, and Congress would have to act to end an operation it opposes. The Amendments thus pull the Resolution's teeth (or, perhaps more accurately, repeal those provisions that were expected to constrain Presidential power).

The weakness of the Amendments demonstrates that the concept underlying a war powers resolution, in any form, is inherently flawed. Congress has adequate authority to control war-making under constitutional powers that cannot be supplemented effectively by a statute. The Resolution's acknowledged defects should be remedied, not by attempts at amendment, but by its outright repeal.

The Proposed 1988 Amendments

The first substantive provision of the Resolution to be addressed by the Amendments is in section 2,[17] entitled "Purpose and Policy." While section 2 contains no mandatory language and begins with the general, almost innocuous statement that the framers of the Constitution intended the collective judgment of the Congress and the President to apply to the participation of U.S. forces in hostilities,[18] it ends with the highly controversial section 2(c). This latter section purports to limit the constitutional authority of the President as Commander-in-Chief to commit U.S. forces to actual or threatened hostilities to only three situations: 1) a declaration of war, 2) specific statutory authorization, or 3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[19]

Section 2(c) has been soundly criticized as a seriously incomplete statement of constitutional law. Among the powers it fails to include, but which must certainly be within the President's authority as Commander-in-Chief, are to take action to forestall an imminent attack on the United States, to protect and evacuate U.S. citizens abroad, to carry out treaty obligations, to protect U.S. embassies, to implement the terms of a cease-fire designed to end hostilities involving the United States, to suppress civil insurrection, and, perhaps, to conduct purely humanitarian action that protects non-citizens.[20] Recognizing the constitutional and practical difficulties inherent in an attempt to use a statute as a means of defining the President's constitutional authority, the Amendments would repeal section 2(c) and offer no substitute provision.[21]

The Amendments would also repeal sections 5(b) and 5(c),[22] always the most controversial parts of the Resolution. Section 5(b)[23] purports to require the President to disengage U.S. forces from hostile situations within a sixty- or ninety-day period if Congress has not acted expressly to approve their use, regardless of national security considerations. Section 5(c)[24] purports to require the President to disengage U.S. forces, even before the end of the sixty- or ninety-day period, if Congress so directs by concurrent resolution—a resolution not presented to the President for his signature or veto.

There seems little doubt that both sections are unconstitutional in light of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha.*[25] With respect to section 5(c), the U.S. District Court for the District of Columbia recently stated in *Lowry v. Reagan*[26]

The most recent case, Lowry v. Reagan, 676 F.Supp. 333 (D.D.C. 1987), *appeal dismissed*, No. 87-5426 (D.C. Cir. Oct. 17, 1988), concerned the operations in the Persian Gulf. The plaintiffs, 110 members of Congress, contended that the Resolution's reporting requirements were triggered when the escort operations began. They sought an order requiring the President to submit a report under section 4. Noting the number of unsuccessful bills and resolutions introduced in Congress to invoke the Resolution with regard to the Persian Gulf situation, the district court observed that it was being asked to "resolve a question that Congress seemed unwilling to decide." *Id.* at 338. The court declined to do so, relying on both the remedial discretion and political question doctrines.

[16] Hopkins, *Congressional Reform Advances in the Ninety-Third Congress*, 60 A.B.A.J. 47, 48 (1974).

[17] 50 U.S.C. § 1541 (1982). Section 1 of the Resolution, the Short Title, is uncodified.

[18] *See* 50 U.S.C. § 1541(a) (1982).

[19] 50 U.S.C. § 1541(c) (1982).

[20] *See Hearings on Compliance with the War Powers Resolution Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. 90–91 (1975) (testimony of Monroe Leigh, Legal Adviser to the State Department). *See also* Cruden, *supra* note 2, at 77–81; Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833, 836–43 (1972).

[21] Amendments, *supra* note 5, § 2.

[22] *Id.* § 4(a).

[23] 50 U.S.C. § 1544(b) (1982).

[24] 50 U.S.C. § 1544(c) (1982).

[25] 462 U.S. 919 (1983) (The Supreme Court held unconstitutional the section of the Immigration and Nationality Act that authorized one house of Congress, by resolution, to invalidate a decision of the executive branch to allow a particular deportable alien to remain in the United States. The Court determined that essentially legislative action is subject to the constitutional requirements of passage by a majority of both Houses and presentation to the President.).

[26] *See supra* note 15.

"that this provision does not have the force and effect of law."[27]

The Amendments would, however, expand section 3 of the Resolution,[28] requiring the President to consult with Congress in every possible instance before introducing forces into hostilities. The Amendments would leave the wording of the existing provision unchanged, but add two new sections.[29] One would provide that whenever consultation with Congress is required, the President must consult specifically with the Speaker of the House of Representatives, the President pro tempore of the Senate, and the House and Senate majority and minority leaders. The other would direct the President, at the request of a majority of these individuals, to consult further with a "permanent consultative group," consisting of the Speaker, President pro tempore, majority and minority leaders, and the chairmen and ranking minority members of the House and Senate Armed Services and Intelligence Committees, the House Foreign Affairs Committee, and the Senate Foreign Relations Committee—eighteen members in all. The President may refuse to consult with the permanent consultative group if he determines that limiting consultation is "essential to meet extraordinary circumstances affecting the most vital security interests of the United States,"[30] but the terms "extraordinary circumstances" and "most vital security interests" are not defined.

Section 4 of the Resolution,[31] the provision requiring the President to submit a report within forty-eight hours after introducing U.S. forces into actual or threatened hostilities, would be unaffected by the Amendments. The Amendments, however, deal with the history of Presidential indifference to the reporting requirements by empowering the permanent consultative group to determine, by majority vote, when a report should be submitted, in the event the President submits none.[32]

With sections 5(b) and (c) repealed, neither the submission of a report by the President nor the permanent consultative group's vote that one should have been submitted starts the running of an arbitrary time period. Instead, a designated member of the permanent consultative group may, with authority from the group, introduce a joint resolution that either expressly authorizes the continued use of U.S. forces in the hostile situation, or requires that U.S. forces be disengaged.[33] The Amendments establish expedited procedures for committee and floor action on any joint resolution so introduced.[34] In contrast to the concurrent resolution of the present section 5(c), however, a joint resolution passed under the Amendments would be presented to the President for his signature or veto.[35] The Amendments preserve the right of any individual member of Congress to introduce a similar bill or joint resolution on his own initiative,[36] but only legislation sponsored by the permanent consultative group is entitled to the expedited procedures.

In a wholly new section, the Amendments would prohibit the use of appropriated funds for any activity having the purpose or effect of violating a provision of law enacted under the Amendments.[37] Another new section would authorize any member of Congress to bring an action in the District Court for the District of Columbia for declaratory and injunctive relief, if the President or the armed forces fail to comply with a bill or joint resolution passed under the Amendments' terms.[38]

The Amendments contain no provision applicable to the situation in which Congress fails to act, neither authorizing the Presidential deployment of U.S. forces, nor requiring withdrawal. With the repeal of sections 5(b) and (c) of the present Resolution, the deployment would presumably have the same legal and political status as one undertaken before 1973, (which would also be true if a joint resolution was approved by Congress but was successfully vetoed). What is clear, then, is that the Amendments would require Congress to act to terminate a military operation of which it disapproves. The prohibition on use of appropriated funds, the right of a member of Congress to bring suit, and any obligation on the part of the President to withdraw U.S. forces from a situation all depend on legislation adopted specifically in response to the particular situation. Absent specific legislation, the only substantive provision pertaining to the President is the duty to consult and render reports.

For these reasons, a revision of the Resolution along these lines would likely end the constitutional debate over the Resolution. No longer would a statute purport to limit the President's constitutional authority as Commander-in-Chief or to deprive him of his power to veto legislation. The proposed Amendments, however, raise important questions of their own. Will detailed procedures for consultation between the President and Congress actually further such consultation? What are the implications of an automatic funding cutoff and grant of standing to any member of Congress to litigate an alleged violation of a law enacted under the amended Resolution? Do the answers to the preceding questions indicate that the theory of a war powers resolution, in whatever form, is simply flawed?

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[27] 676 F.Supp. at 335. *See also Chadha,* 462 U.S. at 967, 970–71, 1003 (White, J., dissenting) (stating effect of *Chadha* decision was to invalidate section 5(c) along with other statutes); Note, *Applying* Chadha: *The Fate of the War Powers Resolution,* 24 Santa Clara L. Rev. 697 (1984) (author argues that both sections 5(b) and 5(c) are unconstitutional under *Chadha* and that despite the Resolution's separability clause (section 9, 50 U.S.C. § 1548 (1982)), these sections are so essential to the purpose of the Resolution that their invalidity renders the whole Resolution unconstitutional).

[28] 50 U.S.C. § 1542 (1982).

[29] Amendments, *supra* note 5, § 3.

[30] *Id.*

[31] 50 U.S.C. § 1543 (1982).

[32] Amendments, *supra* note 5, § 4(a).

[33] *Id.*

[34] *Id.* § 6.

[35] *Id.*

[36] *Id.*

[37] *Id.* § 5.

[38] *Id.* § 4(a).

Weaknesses in the Amendments

It would seem that hopes of improved consultation between the President and Congress will not be realized, particularly in view of the experience under the existing Resolution. The timing and extent of the consultation (as well as the reporting) have always been under the President's control. There would seem to be no reason to expect this state of affairs to change as a result of the Amendments' designation of specific congressional leaders to be consulted and the creation of a permanent consultative group. Indeed, the mere size of the permanent consultative group may give the President a reason to avoid truly substantive consultation.

The fact that the timing and extent of the consultation are under the President's sole control is the fatal weakness inherent in an attempt to obtain consultation by statutory prescription. The Resolution's ineffectualness is apparent from the language of section 3, unchanged by the Amendments, requiring the President to consult with Congress "in every possible instance"[39] before committing U.S. forces to hostilities. Obviously, the language is hortatory, for only the President can decide the need for haste and secrecy in undertaking a military operation. While the President's duty to consult becomes mandatory after forces have been deployed, a mere statute is powerless to affect the President's control of the nature and extent of the consultation, and even its timing in relation to crucial military decisions.

Consultation between the President and Congress can be accomplished, and can be effective, in the absence of a war powers resolution.[40] Certainly, in a time in which U.S. forces are deployed in a hostile situation, congressional leaders can obtain a meeting with the President simply by requesting one. Nothing of substance is likely to be added by a statutory procedure.

While the Resolution's consultation provisions have been described as its redeeming feature,[41] the evidence for such a claim, after fifteen years of experience, is lacking. It would appear that the commentators have failed to draw a clear distinction between the desirability of consultation and the desirability of a statute requiring consultation.[42] In praising the merits of Presidential consultation with the Congress, proponents of the Resolution have failed to demonstrate that the Resolution is, in fact, effective in bringing it about.

If the worth of statutory provisions requiring consultation is doubtful, at best, the Amendments' substantive additions to the law—a prohibition on use of appropriated funds to maintain a military operation in violation of a law passed under the Amendments' procedures, coupled with the right of any member of Congress to sue the President and the armed forces over an alleged violation—appear dangerous and unpredictable. At first reading, these provisions may seem unobjectionable; funds are cut off and standing to sue arises only if Congress enacts a bill or resolution requiring withdrawal of U.S. forces from a particular operation. If, however, Congress is able to achieve a political consensus sufficient to pass such a resolution or bill, the Amendments would appear to contribute nothing meaningful toward the stated purpose of asserting Congress's role in the war-making process. Congress possesses the ability to cut off funds for a particular military operation and to authorize the filing of a suit, absent any form of war powers resolution.

Without clarifying or adding to the powers of Congress, the Amendments would leave open the possibility of considerable ambiguity and uncertainty, even when grave national security issues are at stake. In light of fifteen years of history, it is evident that Congress may seldom, if ever, be able to enact a definitive bill which unambiguously and directly requires the President to remove U.S. forces from a specified situation. More likely would be an enactment authorizing the President's continued use of U.S. forces in the situation, but attaching various qualifications and conditions—conditions that could not anticipate changes in a rapidly developing military situation and that could well contain ambiguities.[43] In a changing situation, national security considerations could compel the President to act—and at least arguably violate a spending restriction—before Congress is able to reassess its authorization.[44]

In such a case, the Amendments' prohibitions would be inflexible, no matter how important the national security interests at stake. They would compound the harm by adding the possible spectacle of a single member of Congress suing over a spending violation, real or imagined. The courts may

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[39] 50 U.S.C. § 1542 (1982).

[40] An example of effective, pre-Resolution consultation is described in Ehrlich, *The Legal Process in Foreign Affairs: Military Intervention—a Testing Case*, 27 Stan. L. Rev. 637, 650–51 (1975). On April 3, 1954, Congressional leaders met with President Eisenhower to discuss a proposal that U.S military forces intervene on behalf of the French in Indochina. The members of Congress participating in the meeting all opposed unilateral U.S. intervention, and their arguments proved persuasive to the President, even though the proposal for U.S. intervention had been forwarded by the Joint Chiefs of Staff and endorsed by the Secretary of State.

[41] Cruden, *supra* note 2, at 130.

[42] The author of Note, *The Recapture of the* S.S. Mayaguez: *Failure of the Consultation Clause of the War Powers Resolution*, 8 N.Y.U.J. Int'l L. & Pol. 457 (1976), recognized the inherent impracticalities in attempting to enforce a statutory requirement that the President consult with Congress. Although the author proposed a revision to specify the congressional leaders who must be consulted (something the Amendments would do), arguing that such a change would "strengthen" the Resolution, he nonetheless conceded, "In the long run the Resolution will be only as valuable as Congress chooses to make it."

[43] The point is well illustrated by the controversy over the scope of the Boland Amendment, a controversy congressional plaintiffs attempted unsuccessfully to litigate in *Sanchez-Espinoza v. Reagan*. In dismissing the plaintiffs' claims as nonjusticiable political questions, the district court noted that the President had asserted on numerous occasions, both to Congress and to the public, that the Administration was not violating either the letter or the spirit of the Boland Amendment in Nicaragua. The court also noted media accounts indicating that members of Congress strenuously disagreed, and determined that it could not rule on the issue without expressing a lack of the respect due coordinate branches of government. 568 F.Supp. at 600.

[44] Because a bill or resolution passed under the Amendments would have such a dramatic effect on ongoing military operations, a Congress not prepared to make a definitive policy decision may well fail to enact any bill or resolution at all. Congress has hesitated to invoke the War Powers Resolution in the Persian Gulf situation, where doing so would create the possibility that under section 5(b), the President would be required to withdraw all forces from that region at the end of an arbitrary time period, solely as a result of congressional inaction, and with no regard to either the military situation or national security considerations. *See supra* note 14 and accompanying text. A bill or resolution passed under the Amendments could have a similar effect because of the spending prohibitions, and thus actually prevent a congressional consensus.

refuse to hear that kind of case as presenting nonjusticiable political questions.[45] They should. If U.S. service members are risking and losing their lives under legally ambiguous circumstances, the policy questions should be resolved on the floors of Congress, not in the courtroom.

In that light, the proposed Amendments merit rejection. The question remains, however, whether the concept of a war powers resolution, whatever its form or specific provisions, is valid. The aim of the 1973 Resolution, in the words of its proponents, has been "to reestablish the constitutional balance"[46] between the legislative and executive branches with respect to the power to commit the nation to war. But as one commentator astutely observed more than a decade ago, that is expecting too much of a single document.[47]

Absent any war powers resolution, Congress has formidable political powers with which to correct any imbalance in the war-making authority. Congressional powers include investigations and hearings, specific legislation, appropriations restrictions, and even impeachment. The solution to perceived excesses by the President lies in an act of political will by Congress, combined with a readiness to assume responsibility for the policy it chooses to make.

Conclusion

With failure obvious, Congress should repeal the War Powers Resolution. Repeal, not revision, would best ensure that when the President deploys U.S. forces to meet what he believes to be vital national security interests, Congress will debate the wisdom of the policy, not the application of a statute.[48] The separate debate over the Constitution's allocation of war-making powers between the legislative and executive branches would no doubt continue after repeal, and the debate will be useful to the extent it can inform and enlighten the political process. No statute, whatever its form, can hope to resolve this debate for any and all situations that may occur in an unknown future. As Eugene V. Rostow, Under Secretary of State in the Johnson Administration, once pointed out:

> No one could possibly write what the [War Powers Resolution] purports to be—a codification of what the Founding Fathers prudently left uncodified, the respective powers of Congress and the President in relation to the use of the national force.[49]

Ultimately, the limits of the President's war-making powers are, and must be, political questions. The War Powers Resolution failed fundamentally because it did not recognize this. After fifteen years of futile experimentation, Congress should abandon efforts to make the Resolution "work" and strike this discredited device from the statute books.

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[45] *See* cases discussed *supra* note 15.

[46] *E.g., Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess. 129 (1971) (statement of Senator Javits).

[47] Cruden, *supra* note 2, at 131.

[48] *See* remarks cited *supra* note 4.

[49] Rostow, *supra* note 20, at 900. Rostow also stated at the same time, quite cogently:
The real crisis of our foreign policy can be resolved only through a disciplined and scrupulous examination of what the nation must do, given the condition of world politics, to preserve the possibility of surviving as a democracy at home. That process will be difficult at best. The relevant Congressional Committees, and Congress as a whole, should be leading the nation in a courteous and sustained debate, through which we could hope to achieve a new consensus about foreign policy, as vital, and creative, as that which sustained the line of policy which started with the Truman Doctrine, the Marshall Plan, NATO and its progeny, and the Point Four Program.
Id. at 899–900.

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The Advocate for Military Defense Counsel

Burdens of Proof in Fourth and Fifth Amendment Suppression Cases Within the Military Justice System

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Introduction

This article is an overview of the burdens of proof applicable in fourth and fifth amendment suppression motions in courts-martial. The attached chart (Appendix) provides a ready trial reference for counsel as they prepare for and litigate motions to suppress evidence based on fourth and fifth amendment grounds.

This article addresses the following subjects: 1) the accused's burden of proof in fourth amendment suppression

motions; 2) the defense threshold burden of proof of a reasonable expectation of privacy; 3) the government's burden of proof that the search or seizure was authorized, consensual, or not subject to the warrant requirement; and 4) exceptions to the exclusionary rule.

The latter section of this article addresses the burdens of production and proof with respect to suppression motions based on the fifth amendment.[1] Throughout each discussion of the burdens of proof, this article notes the applicable Military Rules of Evidence[2] and their impact on the litigation of these issues.

Fourth Amendment Burdens of Proof in Suppression Motions

The Fourth Amendment

The fourth amendment of the Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but on probable cause, supported by oath or affirmation, and particularly describing the persons or things to be seized.[3]

In order to ensure that government officials are deterred from violating these constitutionally protected rights, courts have created the exclusionary rule, which renders illegally-seized evidence inadmissible at trial. The exclusionary rule is applied in trials by courts-martial and often gives rise to defense motions to suppress evidence. Additionally, the motion to suppress is based upon a specific Military Rule of Evidence that has codified the legal requirements and standards of proof for the resolution of the suppression motions. The attached chart (Appendix) lists the burden of proof that each respective party bears in motions to suppress and the legal authority governing the motion.

The Burdens of Proof in Criminal Cases

There are three basic standards of proof in litigating criminal issues. They are: 1) the "preponderance of the evidence" standard; 2) the "clear and convincing evidence" standard; and 3) the "beyond a reasonable doubt" standard.[4]

In nearly all cases involving suppression motions, the government, in rebutting the motion, bears the burden of proving its case by "a preponderance of the evidence." In some issues, however, such as the consent to search situation, the government must bear a higher burden of proof—"clear and convincing evidence." A discussion of the different burdens of proof follows.

Establishing a "Reasonable Expectation of Privacy"

Ordinarily, the military defense counsel moves to suppress evidence on fourth amendment grounds either by attacking the validity of the government's search warrant/authorization, or by arguing that no exception to the warrant/authorization requirement applies to the facts and circumstances of the case. The first step in the defense counsel's effort, however, is overcoming the burden of proving that the accused had a reasonable expectation of privacy in the item or items to be seized. Formerly, the accused had to demonstrate "standing" to contest search and seizure.[5] This test has given way to the new requirement that the accused demonstrate a "legitimate expectation of privacy in the place to be searched."[6]

In *United States v. Ayala*[7] the Court of Military Appeals quoted the test set out by the Supreme Court in *Smith v. Maryland*[8] for determining whether an accused is entitled to the right to privacy under the fourth amendment:

> First, the person must have "exhibited an actual (subjective) expectation of privacy" . . . [and] "the individual's subjective expectation of privacy [must be] 'one that society is prepared to recognize as 'reasonable.' " "[9]

The burden of proving "a reasonable expectation of privacy" lies with the accused.[10]

Military Rule of Evidence 311(a)(2) provides the following:

> Evidence obtained as a result of an unlawful search or seizure . . . is inadmissible against the accused if . . . [t]he accused makes a timely motion to suppress . . . [and] had *a reasonable expectation of privacy* in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized

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[1] The fifth amendment is also relevant to the discussion of the so-called *Miranda* warnings. *See* United States v. Miranda, 384 U.S. 436 (1966).

[2] Manual for Courts-Martial, United States, 1984, Military Rules of Evidence [hereinafter Mil. R. Evid.].

[3] U.S. Const. amend. IV.

[4] *See generally* Martens, *The Standard of Proof for Preliminary Questions of Fact Under the Fourth and Fifth Amendments*, 30 Ariz. L. Rev. 119–133 (1988). For a discussion of the various standards of proof required, see McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293–1335 (1982).

[5] Alderman v. United States, 394 U.S. 165 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257 (1960); *see* United States v. Muniz, 23 M.J. 201, 204 (C.M.A. 1987). Military Rule of Evidence 301(b) still refers to "standing," but only with regard to a witness at trial who refuses to answer a question based on the fifth amendment and Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

[6] *Muniz*, 23 M.J. at 204 (citing *inter alia* Rawlings v. Kentucky, 448 U.S. 98 (1980); Smith v. Maryland, 442 U.S. 735 (1979); and Rakas v. Illinois, 439 U.S. 128. 148–49 (1978)). *See also* United States v. Ayala, 26 M.J. 190 (C.M.A. 1988); United States v. Clow, 26 M.J. 176 (C.M.A. 1988); United States v. Portt, 21 M.J. 333 (C.M.A. 1986); Mil. R. Evid. 311(a)(2).

[7] 26 M.J. 190 (C.M.A. 1988).

[8] 442 U.S. 735 (1979).

[9] *Ayala*, 26 M.J. at 191 (quoting Smith v. Maryland, 442 U.S. 735 (1979)) (quoting Katz v. United States, 389 U.S. 347 (1967)); *see generally* California v. Ciralo, 476 U.S. 207 (1986); Rakas v. Illinois, 439 U.S. 128 (1978).

[10] *See also* United States v. Miller, 13 M.J. 75 (C.M.A. 1982).

when challenging a seizure; or the accused would otherwise have grounds to object . . . under the Constitution.[11]

The determination of whether an accused has a reasonable expectation of privacy depends on the facts and circumstances of each case,[12] but "appears to be" a question of law.[13] Again, the accused, who is the moving party, bears the burden.[14]

The Government's Burden of Proof in Fourth Amendment Cases

The Military Rules of Evidence recognize that all relevant evidence is admissible, except as otherwise provided by the Constitution, the Uniform Code of Military Justice, the Manual for Courts-Martial, or any act of Congress applicable to members of the armed forces.[15] Additionally, the Military Rules of Evidence expressly prohibit the use of illegally seized evidence. Once the accused makes an objection to illegally seized evidence (and satisfies the burden of proving a reasonable expectation of privacy), the government must prove by a preponderance of the evidence that the evidence is admissible.

> When an appropriate motion or objection has been made by the defense under subdivision (d) [of Rule 311], the prosecution has the burden of proving by a *preponderance of the evidence* that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend or a search or an arrest warrant.[16]

Searches Based On Warrants or Military Authorization

Assuming that a "reasonable expectation of privacy" exists, the accused may then attack the legality of the search itself by contesting the legality of the warrant or command authorization, or arguing that no exception to the warrant requirement exists. After the accused has raised sufficient evidence to go forward on the motion, the government must demonstrate that the search was conducted pursuant to judicial or military authorization, probable cause, or under a recognized exception to the probable cause requirement. The government must prove these facts by a "preponderance of the evidence."[17]

Military judges and designated magistrates may issue search warrants pursuant to Military Rule of Evidence 315(d)(2). Unique to the military is the search authority of the "commander or other person serving in a position designated by the secretary concerned . . . who has control over the place where the property or person to be searched or seized is found."[18] Accordingly, the military authorization and the routine administrative inspection of military troops and property present unique legal issues in trial by courts-martial.

The commander, magistrate, or military judge must be impartial,[19] and the search must be based upon probable cause. Under the "totality of the circumstances" test, the government bears the burden of demonstrating by a preponderance of the evidence that probable cause existed.[20]

There should be no distinction between litigating a command-authorized search and one authorized by a military judge or magistrate, despite the fact that "a commander is not subject to some of the requirements imposed on magistrates."[21] In *United States v. Ayala* appellate defense counsel urged that the good faith exception should not apply to a command-authorized search because: 1) commanders have a vested interest in the outcome of the search and therefore are not neutral and detached magistrates; 2) law enforcement officers cannot reasonably rely on an authorization from a commander who ordinarily has less training on the issue of probable cause than the official requesting the authorization; and 3) commanders, unlike military magistrates, should be subject to the deterrent effect of the exclusionary rule. The Army Court of Military Review rejected the argument that the good faith exception should not apply to commanders, and the Court of Military Appeals never reached the issue.[22]

In *United States v. Johnson*[23] the Air Force Court of Military Review apparently held that the good faith exception could not be read into the Military Rules of Evidence; however, this decision was reversed on other grounds.

Exceptions to the Exclusionary Rule

The government bears the burden of proving, by a preponderance of the evidence, that one of the exceptions to

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[11] Mil. R. Evid. 311(a)(2) (emphasis added).

[12] Several recent cases discuss the reasonableness of an expectation of privacy: Carter v. United States, 56 U.S.L.W. 4801 (27 June 1988) (where the Supreme Court held that the fourth amendment does not bar use of evidence discovered by police during unlawful entry if same evidence is subsequently discovered pursuant to an independent search warrant); Michigan v. Chesternut, 56 U.S.L.W. 4558 (13 June 1988) (law enforcement investigatory pursuit did not constitute a "seizure" triggering fourth amendment protections); United States v. Greenwood, 43 Crim. L. Rep. 3029 (16 May 1988) (warrantless search and seizure of garbage left for collection outside the curtilage of a home does not infringe upon anyone's reasonable expectation of privacy).

[13] *Muniz*, 23 M.J. at 204 (citing United States v. Vicknair, 610 F.2d 392 (5th Cir.), *cert. denied*, 449 U.S. 823 (1980)).

[14] United States v. Ayala, 22 M.J. 777, 784 (A.C.M.R. 1986), *aff'd*, 26 M.J. 190 (citing *Miller*, 13 M.J. at 77); *see* Rakas v. Illinois, 439 U.S. 128 (1978).

[15] Mil. R. Evid. 402.

[16] Mil. R. Evid. 311(e) (emphasis added).

[17] *See generally* Mil. R. Evid. 311(e).

[18] Mil. R. Evid. 315(d)(1).

[19] Mil. R. Evid. 315(d).

[20] *See* United States v. Wood, 25 M.J. 46 (C.M.A. 1987).

[21] *Queen*, 26 M.J. at 142.

[22] *Ayala*, 22 M.J. at 777, 26 M.J. at 190.

[23] United States v. Johnson, 21 M.J. 553, 556–57 (A.F.C.M.R. 1985), *rev'd on other grounds*, 23 M.J. 209 (C.M.A. 1987) (per curiam).

the exclusionary rule should apply. This may be accomplished by proving that the illegally obtained evidence "would have been obtained even if such unlawful search or seizure had not been made,"[24] or that the seizure was the result of an appropriate civilian or command authorization.[25] Alternatively, the government could prove that "[t]he individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause,"[26] or that the individuals seeking and executing the warrant or authorization acted in good faith.[27]

In *United States v. Kozak*[28] the Court of Military Appeals neatly laid out the exceptions to the exclusionary rule:

> The first of these exceptions allows illegally obtained items to become admissible "[i]f knowledge of them is gained from an independent source." The second is where the connection between the illegal act and the evidence has "become so attenuated as to dissipate the taint." The third exception . . . is the so-called inevitable discovery rule.[29]

The court, however, did not discuss the burdens of proof in that case. In *United States v. Roa,*[30] however, the Court of Military Appeals recognized the standard for determining who bears the burden of proof in the inevitable discovery cases:

> As the Supreme Court said in *Nix v. Williams,* 467 U.S. at 444, 104 S.Ct. at 2509 [1984]: If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.[31]

If a warrant was issued, it will be extremely difficult to get the evidence suppressed, even though the government bears the burden of proving good faith by a preponderance of the evidence. In *United States v. Leon*[32] the Supreme Court recognized only four situations in which evidence seized pursuant to a warrant should be suppressed. In *United States v. Queen*[33] the Court of Military Appeals reviewed these "exceptions" to the "good faith" exception:

> (1) where the magistrate issued the warrant in reliance on a deliberately or recklessly false affidavit (citing *Franks v. Delaware,* 438 U.S. 154, 98 S. Ct 2674, 57 L. Ed.2d 667 (1978));
>
> (2) "where the issuing magistrate wholly abandoned his judicial role" by failing to act in a neutral and detached manner (citing *Lo-Ji Sales, Inc. v. New York* 442 U.S. 319, 99 S.Ct 2319, 60 L.Ed.2d 920 (1979));
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> (3) where the search warrant was predicated "on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" (quoting *Brown v. Illinois,* 422 U.S. 590, 610–11, 95 S.Ct. 2254, 2265–66 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part)); or
>
> (4) where the search warrant was "so facially deficient" in identifying "the place to be searched or the things to be seized that executing officers cannot reasonably presume it to be valid" (citing *Massachusetts v. Sheppard,* 468 U.S. 981, 988–91, 104. S.Ct. 3424, 3428–30, 82 L.Ed.2d 737 (1984)).

These four exceptions represent the court's conclusion that the exclusionary rule will require suppression of evidence in these fact-specific cases. In other cases, the "good faith" of the person conducting the search may create the exception to the exclusionary rule. While the government bears the burden of disproving any of the above problematic situations, the practical effect of recognizing only four exceptions to the good faith doctrine is that the defense must fit its case into one of the existing categories.

Military Rule of Evidence 314 provides general guidance as to when the government may justify a warrantless search that occurs incident to a lawful stop, frisk, or apprehension. In *United States v. Wood*[34] the Court of Military Appeals provided additional guidance by stating seven factors to be considered in determining whether (under "the totality of the circumstances") probable cause existed to make the initial arrest: (1) whether the informant fits into "the normal profile for 'informants' " in drug cases, or on the other hand, was the informant a "concerned citizen reporting an illegal act . . ."; (2) whether the informant is subject to military orders, and thus more reliable than "a civilian"; (3) whether the informant has provided information on previous occasions; (4) whether the informant voluntarily provided the information; (5) whether the informant is delivering "first-hand" knowledge about an offense (6) whether there is any corroboration for the informant's report; and (7) whether there is any evidence in conflict with the informant's report.[35] Because there was probable cause to arrest in *Wood,* the apprehension was valid, as was the search incident to the apprehension.

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[24] Mil. R. Evid. 311(b)(2).

[25] Mil. R. Evid. 311(b)(3)(A), 315(d).

[26] Mil. R. Evid. 311(b)(3)(B).

[27] Mil. R. Evid. 311(b)(3)(C).

[28] 12 M.J. 389 (C.M.A. 1982).

[29] United States v. Kozak, 12 M.J. 389, 391–92 (C.M.A. 1982) [citations omitted] (where the Court of Military Appeals overruled an early decision in which the inevitable discovery doctrine had not been adopted).

[30] 24 M.J. 297 (C.M.A. 1987).

[31] *Id.* at 303 (Sullivan, J. concurring).

[32] 468 U.S. 897 (1984).

[33] 26 M.J. 136 (C.M.A. 1988) (quoting *Leon*).

[34] 25 M.J. 46 (C.M.A. 1987).

[35] *Wood,* 25 M.J. at 48 (citing Illinois v. Gates, 462 U.S. 213 (1983), and Draper v. United States, 358 U.S. 307 (1959)).

Consent Searches

The litigation of searches based on consent, rather than probable cause, presents a departure from the mere "preponderance of the evidence" standard. In consensual search cases, the government must prove by clear and convincing evidence that the consent was voluntary.[36] The determination of the voluntariness of consent is to be made by considering all the circumstances.[37]

Interestingly, where evidence is seized pursuant to a consent to search by a third party, the government bears the burden of proving that the third party "has a close contact with the place to be searched" (i.e. the authority to consent), in addition to proving by clear and convincing evidence that the third party consent was voluntary.[38]

Burdens of Proof Under the Fifth Amendment

Basis for Objection to Statements "of a Testimonial or Communicative Nature"

Military Rule of Evidence 305, article 31 of the UCMJ, and the fifth amendment (and associated case law) provide that suspects may not be questioned unless they have been first advised of their rights, including: 1) the right to be informed of the nature of the offense of which they are suspected; 2) the right to remain silent; 3) the fact that any statements may be used against them at trial; and 4) the right to counsel.[39] Where military investigators violate article 31, or where government investigators not subject to the code violate the fifth amendment privilege (i.e. the "*Miranda*" rights), resulting incriminatory statements will be considered "involuntary" and "will not be received in evidence." The accused, however, must make a timely objection or motion to suppress the evidence.[40] The accused need only present sufficient credible evidence to raise the issue; the government then has the burden to show by a preponderance of evidence that no article 31 or fifth amendment violation occurred.

In *Edwards v. Arizona*[41] the Supreme Court set out a "bright line" rule prohibiting government investigators from initiating interrogation of a suspect after the suspect has invoked his right to counsel during custodial interrogation.[42] In *Arizona v. Roberson*[43] the Supreme Court took the "bright line" rule one step further, holding that knowledge of a suspect's invocation of the right to remain silent will be imputed to government investigators—even where the subsequent investigation pertains to a different subject matter. These two cases increase the government's burden of demonstrating compliance with UCMJ article 31(b) and the fifth amendment.

In *United States v. Vidal*[44] and *United States v. Coleman*[45] the Court of Military Appeals carved out an "overseas exception" to *Edwards v. Arizona*. This exception provides that where a soldier has made a request for counsel to foreign officials, military investigators *may* initiate interrogation of a military suspect, even if they have actual knowledge of the earlier request for counsel. The result is that the government need only satisfy the burden of proving that the statement of the defendant was voluntary.[46] Once the accused has satisfied the burden of producing some evidence to challenge the voluntariness of a confession, the government bears the burden of proving, again by a preponderance of the evidence, that the statement or confession was voluntary.[47]

Conclusion

The general rule in litigating suppression motions is that once the issue is raised, the government bears the burden of proving the facts by a "preponderance of the evidence." In the case of consensual searches, the burden of proof, once again on the government, is the "clear and convincing evidence" standard. In fourth amendment cases, however, the accused must overcome the threshold burden of demonstrating a "reasonable expectation of privacy." In all cases,

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[36] United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); *see* Mil. R. Evid. 314(c), 316(d)(2); *see generally* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

[37] *Id.* An editorial comment to Mil. R. Evid. 314 notes that:

(i) knowledge on the part of the consenting person of the right not to consent need not be proved, but is one factor to be considered in assessing voluntariness; (ii) mere submission to color of authority is not consent; (iii) whether the consenting person was in custody at the time of granting consent also is just another factor to be considered in assessing the totality of the circumstances. *See United States v. Watson*, 423 U.S. 411 (1976); *United States v. Justice*, 13 C.M.A. 31, 32 C.M.R. 31 (1962); and (iv) prefatory rights warnings are not required but are often helpful to the prosecution in showing voluntariness.

S. Saltzburg, L. Schinasi, & D. Schlueter, Military Rules of Evidence Manual 254 (2d ed. 1986); *see* United States v. Stoecker, 17 M.J. 158 (C.M.A. 1984); United States v. Morris, 1 M.J. 352 (C.M.A. 1976).

[38] Mil. R. Evid. 314(e); Stoner v. California, 376 U.S. 483 (1964); United States v. Boyce, 3 M.J. 711 (A.F.C.M.R. 1977). *See generally* Eisenberg, *Hell Hath No Fury Like . . . A Hostile Third Party Granting Consent to Search*, The Army Lawyer, May 1979, at 1. *See also* Mil. R. Evid. 314(e); United States v. Clow, 26 M.J. 176, 183 (citing United States v. Matlock, 415 U.S. 164 (1974) (consent by accused's mistress held sufficient); Schneckloth v. Bustamonte, 412 U.S. 218 (consent by accused's brother, who was passenger in car was sufficient to demonstrate close contact with the place to be searched); Frazier v. Cupp, 394 U.S. 731 (1969) (consent by joint user of a duffel bag sufficient)).

[39] *See* Miranda v. Arizona, 384 U.S. 436 (1966); UCMJ art. 31(b); Mil. R. Evid. 305. The right to counsel is not contained in article 31(b), but is present in Mil. R. Evid. 305(d) and *Miranda*.

[40] Mil. R. Evid. 304(a).

[41] 451 U.S. 477 (1981).

[42] *Id.* at 484–85.

[43] 108 S. Ct. 2093, 2101 (1988).

[44] 23 M.J. 319 (C.M.A.), *cert. denied*, 107 S. Ct. 2187 (1987).

[45] 26 M.J. 451 (C.M.A.), *petition for cert. filed*, Dkt. No. 88–824 (18 Nov. 1988)

[46] For the *Edwards* and *Roberson* decisions to apply in the overseas setting, the accused must argue that the initial interrogation by foreign officials was instigated by a U.S. official or that a "United States official performed [an] action that could be considered a subterfuge for obtaining a statement" *Coleman*, 25 M.J. at 686–87.

[47] *See* Lego v. Twomey, 404 U.S. 477 (1972); *see also* Colorado v. Connelly, 107 S. Ct. 515 (1986).

the Military Rules of Evidence outline the burdens and provide general guidance on the issue. By developing an accurate and complete record, the defense can preserve the motion for appeal, unless a guilty plea waives the issue. In summary, the appendix to this article will further assist counsel in the preparation and litigation of suppression issues, at trial and on appeal.

Burdens of Proof In Fourth Amendment Suppression Motions

Issue	Who Bears Burden	Standard of Proof	MRE	Case Law
Reasonable expectation of privacy	Defense	(1) actual (subjective) expectation of privacy; and (2) subjective expectations is "one that society is prepared to recognize as 'reasonable' "	311(a)(2)	*Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Ayala*, 26 M.J. 190 (C.M.A. 1988).
Illegally Seized Evidence	Government	Preponderance of Evidence	311(e)	
Command-Authorized Search	Government	(1) proper person (*i.e.*, "commander or other person designated . . ."; (2) person is impartial; (3) search is based on probable cause (Note: determination is based on "totality of the circumstances.")	311(b)	*United States v. Wood*, 25 M.J. 46 (C.M.A. 1987)
Inevitable Discovery	Government	Preponderance of evidence	311(b)(2)	*United States v. Roa*, 24 M.J. 297 (C.M.A. 1987)
Good Faith Exception	Government	Preponderance of evidence. However, four exceptions to good faith: (1) magistrate's reliance on a deliberately or recklessly false affidavit; (2) magistrate has abandoned his role; (3) affidavit underlying the warrant is so deficient that reliance on it unreasonable; or (4) the search warrant was facially deficient.	311(b)(3)(C)	*United States v. Leon*, 468 U.S. 897 (1984); *United States v. Queen*, 26 M.J. 136, 141 (C.M.A. 1986).
Search Incident to Arrest	Government	Under the totality of the circumstances, whether probable cause to arrest existed	314	*United States v. Wood*, 25 M.J. 46 (C.M.A. 1987).
Consensual Searches	Government	By clear and convincing evidence that consent was voluntary	314	*United States v. Middleton*, 10 M.J. 123 (C.M.A. 1981).
Consensual Searches (third party)	Government	By clear and convincing evidence that (1) the third party "has a close contact with the place to be searched," and (2) consent was voluntary.	314	*United States v. Clow*, 26 M.J. 176, 183 (C.M.A. 1988).

Burdens of Proof In Fifth Amendment/Article 31 Suppression Motions

Admissibility of Admission/Confession taken by Authorities	Government	By a preponderance of evidence that statement was voluntarily given in compliance with UCMJ art. 31	304/305	*Lego v. Twomey*, 404 U.S. 477 (1972)
Foreign interrogations (the "overseas exception")	(1) By Government	By a preponderance of evidence that statement was voluntarily given; except	304	*United States v. Coleman*, 25 M.J. 697 (A.C.M.R. 1987),
	(2) By Defense	To demonstrate that Foreign interrogators were acting as agents of the military, so that UCMJ art. 31 and the 5th Amendment apply.	305(h)	*aff'd* 26 M.J. 451 (C.M.A. 1988) (where "overseas exception" applied).

Challenging Peremptory Challenges—A Primer for Defense Counsel

Introduction

Although the issue appeared to have been resolved by an earlier *en banc* decision of the Army Court of Military Review,[1] the Court of Military Appeals has recently made it official by firmly applying the constitutional standards of *Batson v. Kentucky*[2] to court-martial practice. Under the holding of the court in *United States v. Santiago-Davila*[3] it is prohibited for a trial counsel to use a peremptory challenge purposefully to exclude a court member of the same cognizable racial group as the accused.[4] When the factual circumstances of a peremptory challenge raise a *prima facie* showing of prohibited discrimination, the burden shifts to the trial counsel to articulate a neutral explanation for the challenge. This explanation by the trial counsel must be more than an assertion of good faith.[5] The military judge must then determine whether purposeful discrimination has been established and, if so, deny the peremptory challenge.[6]

Although the lead opinion in *Santiago-Davila* recognizes the inherent difficulties of weighing the explanation by trial counsel against the circumstances involving the exercise of the peremptory challenge, Chief Judge Everett concluded that the court was confident "that military judges will be equally able to deal with this issue whenever it arises."[7] The purpose of this note is to promote a similar confidence among trial defense counsel that they too will be "equally able to deal" with litigating improper peremptory challenges.

Defining Racially Cognizable Groups

The first requirement in opposing trial counsel's use of the peremptory challenge is to define the specific nature of the alleged discrimination. The law is still unsettled on whether the challenged juror must be of the same racially cognizable group as the defendant.[8] Where the accused, however, is a member of the same race, national origin, or ethnic identity as the peremptorily challenged member, then an essential factor has been established in raising impermissible discrimination. The decision in *Santiago-Davila* broadly defines "cognizable racial group" as "a class or kind of people unified by community interests, habits, or characteristics."[9] Accordingly, identifiable ethnic groups, such as Puerto Ricans,[10] Mexican-Americans,[11] and Italian-Americans,[12] qualify as "cognizable racial groups." In implementing its affirmative action program, the Department of the Army has defined racial and ethnic designations based upon standardized Department of Defense categories and reporting codes.[13] Arguably, other class or group classifications that fall within recognized areas of suspect discrimination may also be sufficient to question a trial counsel's exercise of the peremptory challenge.[14] For example, removal of the only female member (when the accused is also female) would create as strong an indication of discrimination as would the removal of a member of a specific race or ethnic identity.[15] In any case,

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[1] United States v. Moore, 26 M.J. 692 (A.C.M.R. 1988), *pet. granted*, 27 M.J. ___ (C.M.A. 3 Oct. 1988). The court's *en banc* decision on reconsideration involved a total of five separate opinions.

[2] 476 U.S. 79 (1986).

[3] 26 M.J. 380 (C.M.A. 1988).

[4] "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by *defense* counsel." *Batson*, 476 U.S. at 89 n.12 (emphasis added). The State of Alabama, however, is currently petitioning the Supreme Court to extend *Batson* to discrimination by defense counsel. Alabama v. Cox, Nat'l L.J., Nov. 14, 1988, at 3, col. 1, *petition filed*, No. 88–630.

[5] 26 M.J. at 392.

[6] 26 M.J. at 392–93.

[7] 26 M.J. at 392 (citing *Batson*, 476 U.S. at 97).

[8] "In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race." *Batson*, 476 U.S. at 99. Similarly, Army regulations prohibit use of discrimination in any duty assignment "on the basis of race, color, religion, gender or national origin." Army Reg. 600–21, Equal Opportunity Program in the Army, para. 2–1*b* (30 Apr. 1986). Although many decisions may blur the distinction between due process of law violations under the fifth amendment with fair cross-section of the community under the sixth amendment, challenges have been allowed by a defendant of a different race. *Cf.* Fields v. People, 732 P.2d 1145 (Colo. 1987) (black defendant, Hispanic jurors); *but see* Kibler v. State, 501 So. 2d 76 (Fla. Dist. Ct. App. 1987) (white defendant has no standing to challenge removal of black juror).

[9] 26 M.J. at 391 n.12; *see generally* McCleskey v. Kemp, 107 S. Ct. 1756, 1779 n.39 (1987) (comprehensive summary of judicially-recognized minorities); Saint Francis College v. Al-Khazraji, 107 S. Ct. 2022 (1987) (racial discrimination includes "discrimination directed against any individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens"); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987).

[10] 26 M.J. at 390; Cartagena v. Secretary of the Navy, 618 F.2d 130 (1st Cir. 1980).

[11] Castaneda v. Partida, 430 U.S. 482 (1977).

[12] United States v. Biaggi, 673 F.Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988); United States v. Sgro, 816 F.2d 30 (1st Cir. 1987).

[13] Dep't of Army, Pam. 600–26, Department of Army Affirmative Action Plan, Table 1–2 (13 Dec. 1985). The Army Court-Martial Information System defines four primary race indicators and 27 different ethnic groups.

[14] *Batson*, 476 U.S. at 124 (Burger, C.J., dissenting) ("if conventional equal protection principles apply, then presumably defendants could object to exclusions on the basis of not only race, but also sex . . . age . . . religious or political affiliation").

[15] *Cf.* United States v. Smith, 27 M.J. 242 (C.M.A. 1988) (Fort Ord policy of selecting female members for sex cases tainted selection of entire court-martial panel).

the race, ethnic group, or suspect classification must be clearly identified on the record.[16]

Establishing a Prima Facie Case

When *United States v. Moore* was decided, it appeared that court-martial practice would recognize a *per se* requirement for trial counsel to explain any peremptory challenge against a member of the accused's race.[17] It was generally believed that this holding "eliminate[d] the need for the defense to present a *prima facie* case of purposeful discrimination."[18] Regretfully, the majority of the court in *Santiago-Davila* elected not to adopt the *per se* rule formulated by the Army Court of Military Review.[19] Judge Cox, however, made a persuasive argument in his concurring opinion for adoption of the *per se* rule of *Moore* to ensure uniformity in court-martial practice. Accordingly, trial defense counsel should continue to urge application of the *per se* rule in Army courts-martial,[20] but still document the *prima facie* case of discrimination on the record. In this regard, the following factors should be highlighted on the record: 1) selection by the convening authority of each member of the panel as being best qualified for judicial duties under Uniform Code of Military Justice art. 25(d)(2);[21] 2) lack of any meaningful *voir dire* of the challenged member upon which a neutral reason could be based;[22] 3) absence of a denied challenge for cause against the member;[23] 4) only member on panel of the accused's specific racial group;[24] 5) challenged member is one of the senior officers or noncommissioned officers on the panel;[25] 6) no prior service as member in a court-martial before the same trial counsel; and, 7) timely appearance by member for court-martial duty and appropriate attentiveness throughout *voir dire*. Care should also be exercised to note whether the court member was singled out by trial counsel for unfair questioning designed to generate a justification for removal. In meeting its initial burden to require trial counsel to articulate a neutral reason, the defense need only present sufficient facts and circumstances to *raise an inference* of purposeful discrimination.[26] In weighing whether this inference has been raised, the military judge is required to judicially acknowledge that "peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate."[27]

Rebutting Trial Counsel's Explanation

There is no presumption that trial counsel has exercised his peremptory challenge in good faith.[28] Similarly, an assertion by trial counsel of good faith or the lack of intent to discriminate is insufficient to rebut the inference of purposeful discrimination.[29] The military judge has an affirmative obligation to critically evaluate proffered explanations to determine if they are bona fide.[30] The most effective way of scrutinizing explanations offered by trial counsel is to apply the proffered reasoning to similarly situated nonminority members and consider whether the explanation is so broad as to be invalid or meaningless.[31] If a member is removed for a trait other than race, that trait must specifically apply to the court member and to the facts of the particular case. As an example, trial counsel may announce that their motivation in removing court members was solely to offset a numerical advantage gained by the defense.[32] If this is in fact the true motivation, then certainly the government would have no objection to excusing a

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[16] The factual situation in *Santiago-Davila* is illustrative of the problems created by an ambiguous record. Two individuals with Spanish surnames were appointed as court members. Questions during *voir dire* revealed that one was raised in upper New York and the challenged member in Puerto Rico (the same as appellant). Government appellate counsel argued throughout the appeal that it was just as likely that the New York member was Puerto Rican and the challenged member a Hispanic of some other national origin. 26 M.J. at 391–92.

[17] 26 M.J. at 700–01.

[18] Hancock, *Challenging the Challenges by Trial Counsel*, The Army Lawyer, Sept. 1988, at 43, 44.

[19] The *en banc* decision in *Moore* was decided after briefs and oral arguments had been completed in *Santiago–Davila*. Chief Judge Everett made only one general reference to *Moore*. 26 M.J. at 390 n.9.

[20] The Supreme Court decision in *Batson* does not preclude adoption of the *per se* rule. "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." 476 U.S. at 99 n.24.

[21] The *per se* rule is simply a recognition of the reality that the government has been granted an unlimited number of peremptory challenges by the selection process itself. Having been permitted to handpick each court-martial panel, there is a strong presumption, absent explanation, that the government would be using improper reasons to remove otherwise qualified members. *See Santiago–Davila*, 26 M.J. at 393 (Cox, J., concurring).

[22] The court in *Santiago-Davila* placed special emphasis on the absence of anything in the *voir dire* to justify exclusion of the challenged member. 26 M.J. at 391.

[23] Judge Cox has recommended against use of the peremptory challenge by trial counsel unless a challenge for cause against the same member has first been denied. 26 M.J. at 380 (Cox, J., concurring).

[24] *See, e.g.*, United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987); Saadig v. State, 387 N.W.2d 315 (Iowa 1986).

[25] In *Santiago-Davila* the court recognized a government preference for senior court members. 26 M.J. at 392.

[26] "We can deduce [from Title VII discrimination cases] that the *prima facie* showing threshold is not an extremely high one—not an onerous burden to establish. It simply requires the defendant to prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances." Stanley v. State, 542 A.2d 1267, 1277 (Md. 1988) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1982).

[27] *Batson*, 476 U.S. at 96.

[28] United States v. Wilson, 853 F.2d 606, 609 (8th Cir. 1988); *Batson*, 476 U.S. at 98.

[29] 26 M.J. at 392 (quoting *Batson*, 476 U.S. at 97).

[30] Slappy v. State, 503 So.2d 350 (Fla. Dist. Ct. App. 1987); Johnson v. State, 731 P.2d 993 (Okla. Crim. App. 1987).

[31] *See generally* Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987); State v. Butler, 731 S.W.2d 265 (Mo. App. 1987); Gamble v. State, 357 S.E.2d 792 (Ga. 1987); State v. Gilmore, 511 A.2d 1150 (N.J. 1986); *but cf. Moore*, 26 M.J. at 692 ("In this respect, we will limit the level of scrutiny into the reasons provided.").

[32] "Neither the defense nor the government has any right to a numerical advantage" in the voting composition of the court-martial. United States v. Newson, 26 M.J. 719, 721 (A.C.M.R. 1988).

nonminority member in place of the challenged one. Although the Army Court of Military Review has opined that it may be unwilling to permit such close scrutiny of the reasons given by trial counsel, the language used by Chief Judge Everett in *Santiago-Davila* raises the issue of whether a reasonable opportunity to cross-examine the prosecutor may be required by *Batson* in specific cases.[33]

It is also insufficient to defend an otherwise impermissible challenge on the basis that other minority members remain on the panel. First, the presence of only one peremptory challenge per side in military practice makes any such argument meaningless, because there is no way to determine how trial counsel would have exercised any additional challenges. Secondly, the question under *Batson* is whether a juror was excluded because of race, not whether the prosecutor has drastically altered the composition of the jury. "[T]here is no logic in permitting the prosecutor, through the use of his peremptory challenge, to do what the convening authority, in the selection of panel members, cannot."[34]

Conclusion

Once the prosecutor has placed his explanation on the record and the defense has been permitted to raise any relevant matters in rebuttal,[35] the military judge will rule on the issue and make findings of fact. "If a reasonable, racially neutral explanation is not presented, the peremptory challenge will be disallowed, and trial counsel may challenge a different member."[36] Because credibility will be an important factor in any findings of fact, "great deference" will be afforded the military judge.[37] Accordingly, aggressive litigation of the issue at the time the challenge is exercised is essential if the constitutional protections contemplated by *Batson* are not to "be but a vain and illusory requirement."[38] Major Marion E. Winter.

Speedy Trial: Delay for Good Cause

In *United States v. Higgins*[39] the Court of Military Appeals held that where a delay in bringing the accused to trial occurred as a result of processing the accused's tendered resignation outside the local command, such delay was excludable from government accountability as a "delay for good cause," absent any defense allegation or showing of government foot-dragging.[40]

The court first noted that their decision was not necessarily controlled by their earlier decision in *United States v. O'Brien*.[41] In *O'Brien* the accused was in pretrial confinement. His request for administrative discharge pursuant to Chapter 10, Army Regulation 635–200 was acted on at the local command level, and a request for speedy trial was made.[42]

In *Higgins* the accused, a captain in the United States Air Force, was not in pretrial confinement. Further, the processing of his resignation required action beyond the convening authority level.[43] The processing of the resignation took ninety-four days, a period that both the military judge and the Court of Military Appeals found to be reasonable.[44] Finally, defense counsel made no request for speedy trial.

The court, in an analysis of Rule for Courts-Martial 707(c)(8)[45] and the standards of the American Bar Association relating to speedy trial, held that requests for discharge requiring processing outside the command are beyond the command's control and therefore constitute "delay for good cause."[46]

The court, in both its analysis and holding, apparently disagreed with the Air Force Court of Military Review's decision in *United States v. Miniclier*.[47] The Air Force court, on almost identical facts, held that delays incident to the processing of an officer's resignation did not fall within the types of delays for "good cause" contemplated by

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[33] 26 M.J. at 392–93. Because the court ordered a limited hearing in *Santiago–Davila* to determine what justification, if any, the trial counsel had for the exercise of his peremptory challenge, the decision appears to reject the use of *ex parte* affidavits employed in *Moore*. *Compare* United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987) (impermissible to explain *ex parte*), *with* United States v. Davis, 809 F.2d 1194 (6th Cir. 1987) (permissible to explain *ex parte*). The Court of Military Appeals specifically granted review of *Moore* on the issue of whether the Army Court had erred in ordering and considering the post-trial affidavit of trial counsel to explain the reasons for exercise of his peremptory challenge. 27 M.J. at ___.

[34] *Moore*, 26 M.J. at 698.

[35] *See* Stanley v. State, 542 A.2d at 1272 (defendant "must be afforded a fair opportunity to demonstrate that the prosecutor's assigned reason for the peremptory challenge was a pretext or discriminatory in its application").

[36] *Moore*, 26 M.J. at 701.

[37] *Id.*; *see also Santiago–Davila*, 26 M.J. at 392; United States v. West, 27 M.J. 223, 224 (C.M.A. 1988) (military judges' findings of fact will not be disturbed on appeal before the Court of Military Appeals unless clearly erroneous).

[38] *Santiago–Davila*, 26 M.J. at 392 (quoting *Norris v. Alabama*, 294 U.S. 587, 598 (1935)); *Batson*, 476 U.S. at 98.

[39] 27 M.J. 150 (C.M.A. 1988).

[40] *Id.* at 153–54.

[41] 48 C.M.R. 42 (C.M.A. 1973).

[42] *Higgins*, 27 M.J. at 153; *O'Brien*, 48 C.M.R. at 44.

[43] Army Reg. 635–120, Officer Resignations and Discharges, chapter 5 (8 Apr. 1968) (C16, Aug. 1982) sets out similar requirements for processing officer resignations outside the local command as does the Air Force regulation that the court cited.

[44] *Higgins*, 27 M.J. at 151–54.

[45] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 707(c)(8) [hereinafter R.C.M.]. This provision now appears in R.C.M. 707(c)(9).

[46] *Higgins*, 27 M.J. at 153.

[47] 23 M.J. 843 (A.F.C.M.R. 1987).

R.C.M. 707(c)(8).[48] The Air Force court held that such delays were best described as normal incidents of military practice.[49]

Counsel in the field should be aware of this decision; prosecutors may try to extend *Higgins* by analogy and attempt to justify delays in bringing an accused to trial in other cases where the delays are arguably the result of action taken outside the local command. Captain Lauren B. Leeker.

Credit Towards Post-Trial Confinement—Saved By a Document

When a client's liberty has been denied or restricted pending court-martial, and when the conditions of restriction are so onerous that the effect is tantamount to confinement, defense counsel should request that the time spent under confinement or restriction be credited towards a sentence of post-trial confinement.[50] If the motion is to obtain credit for restriction tantamount to confinement—also referred to as *Mason*[51] credit—and it is successful, the facts may then warrant a second motion, pursuant to *United States v. Gregory*,[52] for additional administrative credit. This additional credit is available when the government has failed to comply with the procedural safeguards of Rule for Courts-Martial 305(h) and (i).[53]

Specifically, within seventy-two hours after ordering or being informed of pretrial confinement (or restriction tantamount to confinement), the commander must determine whether continued restriction is appropriate and, if approved, must submit a written memorandum supporting his decision.[54] Within seven days, of imposition of confinement or pretrial restraint tantamount to confinement, a neutral and detached officer must review the probable cause for believing that the soldier committed the offense, as well as the grounds necessitating continued confinement or restriction.[55] Failure of defense counsel to raise the pretrial confinement credit issues may constitute waiver and result in an allegation of ineffective assistance of counsel.

A recent decision by the Army Court of Military Review highlights the need for defense counsel to preserve this issue. In *United States v. Hill*[56] the court declined to apply the automatic waiver rule against appellant because the facts regarding both the pretrial confinement and the magistrate's review were, fortuitously, present in the case documents. The accused had been granted credit for the time spent in pretrial confinement, but his counsel failed to request additional credit for a late magistrate's review. The issue was not waived because of documents in the record of trial. Specifically, the magistrate's checklist indicated that seven days after confinement, appellant had not been advised of his pretrial confinement rights, and the review itself was not conducted until eleven days after confinement. The court declined to apply waiver because the documents were present in the record, and therefore the court did not address the issue of ineffective assistance of counsel.[57]

A successful motion for *Allen*, *Mason*, and *Gregory* credit can substantially reduce a client's sentence. Credit for violating the procedural requirements of RCM 305(k) is granted in addition to *Allen* and *Mason* credit. All types of administrative credit are deducted from the approved, rather than the adjudged, sentence.[58] If a sentence of no confinement is approved, the credit may be applied to offset other forms of punishment, to include hard labor without confinement, restriction, fine, or forfeiture of pay, in that order.[59]

When there has been pretrial confinement (or restriction tantamount to confinement), defense counsel should ensure that the commander's memorandum and the magistrate's checklist are included in the trial packet. Any issues concerning compliance with the procedural safeguards should be preserved by timely motion and developed on the record in order to obtain relief on appeal and avoid allegations of ineffective assistance of counsel.[60] Captain Paula C. Juba.

Ensuring Proper Instructions Are Given in Drug Cases

Recent court decisions have addressed and clarified the instructional requirements in cases before court members in which an accused contests a charge alleging wrongful use or possession of a contraband substance. Not only must the members find that an accused used or possessed a contraband substance and that it was wrongful to have done so, but the members must be instructed that they cannot convict the accused unless they are sure that the accused had knowledge of both the presence and character of the substance.

In *United States v. Mance*[61] the Court of Military Appeals held that in contested cases before court members involving charges of wrongful use or possession of contraband substances, the military judges' instructions should include specific references to the two types of knowledge required to establish criminal liability. The court stated that the two types of knowledge, which must be established beyond a reasonable doubt are: a) knowledge of the *presence* of the contraband substance (knowledge being a component

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[48] *Id.* at 847.

[49] *Id.* at 847–48.

[50] *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

[51] United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

[52] 21 M.J. 952 (A.C.M.R. 1986).

[53] R.C.M. 305(h) and (i).

[54] R.C.M. 305(h).

[55] R.C.M. 305(i).

[56] 26 M.J. 836 (C.M.R. 1988).

[57] 26 M.J. at 838 n. 1.

[58] *See Gregory*, 21 M.J. at 957.

[59] R.C.M. 1003(b)(6) and (7).

[60] *See* United States v. Snoberger, 26 M.J. 818 (A.C.M.R. 1988) (no credit if record is silent about government compliance with R.C.M. 305 (h) and (i)).

[61] 26 M.J. 244 (C.M.A. 1988).

of the "use" element of the offense; and b) knowledge of the *character* of the contraband substance (knowledge being a component of the "wrongful" element of the offense).[62] The purpose of the instruction is to ensure that the members are aware that if an accused possesses no knowledge of the very presence of a contraband substance, the accused may have a defense as to the *use* or *possession* of the substance.[63] Also, if an accused possesses no knowledge of the physical composition of the substance, then he or she may have a mistake of fact defense as to the *wrongfulness* of the use or possession.[64]

The Court of Military Appeals' decision in *Mance* is consistent with legal precedent authorizing (under appropriate circumstances) the permissive inference of knowledge from the mere presence of the controlled substance.[65] Therefore, the judge may instruct the court members that they may find by permissive inference that the accused possessed the two types of knowledge required.[66]

The instruction in *Mance* appears to have been taken directly out of the Military Judges' Benchbook.[67] The instruction addressed the knowledge requirement as to the contraband nature of the marijuana involved in the case. The instruction failed to include, however, any reference to the accused's knowledge of the drug's presence.[68] In *United States v. Brown*[69] and *United States v. Moran*[70] the appellate courts reversed the convictions because the trial judges failed *entirely* to instruct the court members as to either type of knowledge. A partial instruction on the subject, however, will be tested for prejudice.[71]

Defense counsel in the field should be sensitive to the fact that the sample instructions relating to wrongful use or possession of contraband substances in the Military Judges' Benchbook do not reflect the instructions that are now required to be given to court members. Counsel should ensure that the military judge adequately instructs the members. CPT Wayne D. Lambert.

[62] *Id.* at 253, 254, and 256.

[63] *Id.* at 249.

[64] *Id.*

[65] *Id.* at 254 (citing United States v. Harper, 22 M.J. 157 (C.M.A. 1986)); United States v. Ford, 23 M.J. 331 (C.M.A. 1987).

[66] *Mance*, 26 M.J. at 256.

[67] Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-76.1*b* (C1, 15 February 1985).

[68] *Mance*, 26 M.J. at 248.

[69] 26 M.J. 266 (C.M.A. 1988).

[70] ACMR 8800952 (A.C.M.R. 17 Oct. 1988) (unpub.).

[71] *See Mance*, 26 M.J. at 256; *see also* United States v. Bahneman, ACMR 8800504 (A.C.M.R. 18 Nov. 1988) (unpub.).

Government Appellate Division Note

Legal Efficacy: Fundamental Element In Forgery Cases

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Introduction

The trial counsel carefully prepares the case and successfully obtains a conviction for forgery. Months later, the trial counsel learns that an appellate court has overturned the conviction. What happened? It is quite likely that the appellate court found the "forged" document lacking in legal efficacy. This note will address the principles of forgery and look at a broad range of cases in which military appellate courts have applied the principles.

Principles of Forgery

The offense of forgery is proscribed under article 123, UCMJ. There are two aspects of forgery: making or altering, and uttering. The Manual for Courts-Martial details the elements of a making or altering offense as follows:

(a) That the accused falsely made or altered a certain signature or writing;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice, and;

(c) That the false making or altering was with the intent to defraud.[1]

For an uttering offense, the following elements apply:

(a) That a certain signature or writing was falsely made or altered;

(b) That the signature or writing was of a nature which would, if genuine, apparently impose a legal liability on another or change another's legal rights or liabilities to that person's prejudice;

(c) That the accused uttered, offered, issued, or transferred the signature or writing;

[1] Manual for Court-Martial, United States, 1984, Part IV, para. 48b(1) [hereinafter MCM, 1984].

(d) That at such time the accused knew that the signature or writing had been falsely made or altered; and

(e) That the uttering, offering, issuing or transferring was with intent to defraud.[2]

Each aspect of the forgery offense requires that the subject document apparently impose a legal liability on another or alter another's legal standing to that person's detriment. This is the element of legal efficacy. The Manual explains that apparent legal efficacy can be determined from the document's face or extrinsic facts.[3] If the document does not possess either real or apparent legal efficacy, there is no forgery.[4]

Government Documents

Various types of government documents have been the basis for forgery prosecutions. *United States v. Strand*[5] is a seminal case. The accused was a young soldier who married too hastily, took his new bride back to her home, and returned to duty. Strand desired to end the marriage through deception, as he had not told his new wife his true name. He had a "Naval Speed Letter" prepared and sent to his wife, informing her that the accused had been killed in an automobile accident. The wife was further advised that since the government had been unaware of the marriage, no "retributions" (payments) could be made to her on account of her husband's death.

The Court of Military Appeals (COMA) noted that forgery requires a document to have apparent legal efficacy or be the foundation of a legal liability. COMA also noted the difference between the false contents of a document and the legal effect of a document. Because the letter had no prejudicial legal effect, COMA determined that there was no forgery.

COMA found that the letter did not prejudice the government in any way. The letter did not constitute legal proof of Strand's marriage or death. Strand's wife could not use the letter in order to obtain benefits from the government. The letter, by its very wording, disclaimed any government obligation to provide survivor's benefits. In short, the letter conferred no rights against the government that would not have existed if the letter had never been written. COMA also found that the marital rights of Strand's wife were not affected in any way by the letter.

Another important early case is *United States v. Addye.*[6] Army fiscal regulations allowed a soldier to obtain a "partial payment" of earned pay and allowances before regular payday. This could only be done under certain circumstances and through a letter from the commanding officer. The accused submitted a forged "Request for Partial Payment" letter to the fiscal officer, supposedly signed by the adjutant (not the commanding officer).

COMA determined that the letter on its face did not seem to have any legal effect and was only a request for a courtesy. Taking the Army fiscal regulations into account, however, forgery was clearly made out. The fiscal officer did not have to honor the request letter, but such a letter was required in order for the fiscal officer to act and make the partial payment. In essence, the letter "perfected" the accused's legal right to receive the money. COMA determined that the fiscal regulations did not state what form the commander's approval had to take, and that the adjutant acts for the commander on personnel matters. The letter therefore had apparent legal efficacy.

In a similar vein, a case of forgery was established in *United States v. Driggers.*[7] The accused was convicted of uttering a forged military order in order to obtain approval for a travel request. Driggers had attempted to use the forged order by presenting it to the Red Cross at Fort Campbell. The order was not properly authenticated, so Driggers argued that the order did not have apparent legal efficacy. COMA rejected Driggers' argument.

COMA found that the order, even if apparently genuine, had to perfect a legal right or impose a liability, either independently or in conjunction with other steps. The court determined that the forged document did not have to be a perfect facsimile of a true document. COMA also determined that if the forged document resembled an original so as to deceive a "person of ordinary observation," though not an experienced person, the document could be the subject of a forgery.

The order had to be authenticated when signed by a person other than the commander. Driggers' order lacked the authenticating signature and organizational seal. COMA nevertheless found that the order looked sufficiently genuine and noted that the accused thought so as well, for he tried to obtain a benefit with it. If the order had been accepted by the Red Cross, the government would have incurred a legal liability. As a consequence, the forgery conviction was affirmed.

A close case was *United States v. Phillips.*[8] Phillips and a civilian insurance agent concocted a scheme to defraud an insurance company of commissions. The accused falsely signed allotment authorization forms that purported to authorize allotments to the insurance company. The originals were immediately destroyed. A carbon was sent with the application to the company.

The court looked to the face of the document and noted that the carbon referred to the original, stating that only the original should be signed. The Court also determined that for Army finance purposes, only the original had effect. The carbon copy was an information copy. Based on the carbon, the insurance company had no right to collect premiums. The writing thus lacked legal efficacy and did not constitute a forgery.

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[2] MCM, 1984, Part IV, para. 48b(2).

[3] *Id.*, Part IV. para. 48c(4).

[4] *Id.*

[5] 20 C.M.R. 13 (1955).

[6] 23 C.M.R. 107 (1957).

[7] 45 C.M.R. 147 (1972).

[8] 34 C.M.R. 400 (1964).

The Army Court of Military Review (ACMR) has also considered legal efficacy. In *United States v. Wixon*[9] the court was confronted with a clerk who falsely signed the receiving authority's name on an Army "turn-in" form. The clerk had taken paint spray units home instead of turning them in. ACMR reasoned that the form was akin to a receipt of money. The forged document was used to convince proper authorities that the spray units were in the government's possession, and so directly affected the legal right to possession. The form had legal efficacy and the forgery conviction was upheld.

Allotment forms were reviewed in *United States v. Schwarz.*[10] The accused was a personnel clerk who had trainees fill out allotment forms, leaving the allotee's name and amount blank. A civilian accomplice filled in the name of the insurance company, and the clerk then introduced the completed forms into Army finance channels. The accused received $35.00 as recompense for each form. The court found that this clearly constituted forgery. ACMR held that an allotment is analogous to a bill or check, which shows legal efficacy on its face.

Financial and Insurance Documents

Other documents, which have impact only in the civilian sector, also have a military connection. Such a document was the subject of COMA's legal efficacy analysis in *United States v. Thomas.*[11] In *Thomas* the accused applied for a loan at his local credit union. The loan officers gave him a reference form, a "Commanding Officer's Letter," to be completed by the accused's commander. In very short order, the accused returned with the completed letter. The loan officers were suspicious, called the unit, and discovered that the entries and signature on the document were false. Thomas was convicted for uttering a forged document.

COMA noted that making a false signature or entry on a document is not enough to uphold a conviction for forgery. The court emphasized the common law requirement that the document have legal efficacy. The court then took various factors into account. First, it noted that the credit union was not an agency of the government. Second, the letter was not a prerequisite for favorable loan action. In fact, the letter could be ignored as there were other factors that could mandate favorable action on the loan.

The court held that the letter did not show that Thomas was a member of a class entitled to a benefit or that the credit union had any obligation to him. The letter simply stated that the accused was a good soldier without financial or disciplinary problems. The letter did not impose a liability or change the credit union's rights or liabilities. COMA, despite its strict interpretation of legal efficacy, did not condone the accused's conduct. The court recognized Thomas's plain intent to defraud and suggested that the government could have charged him under some other provision. Nevertheless, the forgery conviction was overturned.

The result was different in *United States v. Noel.*[12] The accused sought a loan from the Navy Relief Society, a private organization. He was interviewed, and a competent person prepared a form that authorized the treasurer of the society to advance $10.00 to the accused. On the way to the treasurer, Noel altered the amount to $70.00, which he then received.

COMA determined that the form resembled a letter of credit. The preparation of the form was a necessary step in order to get money from the Society. The treasurer was required to advance the amount when the form was presented to him. Although the document in and of itself conferred no legal right, it perfected the accused's right to obtain the money. By altering the amount, Noel got more than he was authorized. This affected the Society's rights and decreased the privileges of other borrowers. Since the document had legal efficacy, Noel was a forger.

In *United States v. Farley*[13] COMA considered falsely signed insurance applications. The accused, a personnel officer, had an arrangement with an off-base insurance agent. Farley would obtain insurance applications from base personnel and provide them to the agent, who paid Farley for the applications. At one point, the accused provided two applications. He later admitted that he had signed one of the applications himself. Farley claimed that the forms had no apparent efficacy. It was clear that the forms had falsely made signatures. COMA held that no offense was established, however, as no extrinsic facts showed how the application was used to prejudice another's legal rights.

The Air Force Court of Military Review (AFCMR) made a determination in *United States v. Powell*[14] similar to COMA's in Thomas. In *Powell* the accused attempted to receive a loan from his credit union. He was given a "Verification of Military History" form which he was to complete and have signed by his commander or first sergeant. Powell made false entries and signed the first sergeant's name. The credit union reviewed the loan documents, including the falsely made form, and disapproved the loan.

AFCMR determined that the credit union's form, on its face, did not impose a legal liability or obligation. The court looked at the specification alleging forgery, and noted that no extrinsic facts were alleged that demonstrated how the document appeared to impose legal liability. Although "legal harm" was alleged in the specification, AFCMR found this to be inadequate. The court did not allow Powell to go unpunished, however, and found him guilty of attempted wrongful appropriation.

A very satisfying result was reached by AFCMR in *United States v. Jedele.*[15] The court considered whether a

[9] 23 M.J. 570 (A.C.M.R. 1986), *affirmed*, 25 M.J. 370 (C.M.A. 1987) (summary disposition) (court consolidated specifications because of multiplicity and affirmed; legal efficacy not discussed).

[10] 12 M.J. 650 (A.C.M.R. 1981), *affirmed*, 15 M.J. 109 (C.M.A. 1983).

[11] 25 M.J. 396 (C.M.A. 1988).

[12] 29 C.M.R. 324 (1960).

[13] 29 C.M.R. 546 (1960).

[14] 24 M.J. 603 (A.F.C.M.R. 1987).

[15] 19 M.J. 987 (A.F.C.M.R. 1985).

bankcard charge slip was the proper subject of forgery. In its analysis, the court noted that the document was a commercial slip bearing the account number, account holder's name, and dollar amount on its face. As the functional equivalent of a check, processing the slip would result in a debit to the account and attendant legal prejudice. Because this was apparent from the face of the slip, the court had no difficulty sustaining the conviction.

Miscellaneous Documents

The courts have also had to contend with the question of whether a prescription form could be the proper subject for a forgery charge; in *United States v. Benjamin*[16] the Navy court found that it could. The accused took a forged prescription to one pharmacy on base, which did not stock the drug. He was referred to another pharmacy, where several discrepancies were noted. The signature on the form apparently did not match that of the named doctor. The capsule strength, dosage, and refill information was also incorrect. The court viewed these discrepancies as immaterial.

To the court, the omission of the number of capsules to be dispensed made the document incomplete on its face. There were no extrinsic facts in the record to indicate what amount, if any, the pharmacy would dispense under its normal business practices. The court did not allow Benjamin to escape responsibility, and determined that attempted forgery was demonstrated through the accused's efforts to have the prescription honored.

ACMR recently considered a prescription in *United States v. Ross.*[17] After the accused went AWOL, a prescription form was found among the personal property she left behind. The drug on the prescription form, a German diet pill, was unavailable in government pharmacies. Although the form bore the false signature of a military physician, the document also stated (in four languages) that it was only valid at government pharmacies. At trial, the government conceded that the document did not impose any legal liability.

The court refused to find the document had apparent legal efficacy. The court found that apparent legal efficacy attaches only when the document imposes legal liability on its face, as viewed by the intended recipient. In this instance, the form was a nullity and pharmacists would not perceive a legal obligation. Accordingly, ACMR dismissed the forgery conviction.

A suspect's rights acknowledgment form was at issue in *United States v. Gilbertsen.*[18] The accused was apprehended in regard to drug offenses. He presented an identification card that he had wrongfully obtained from a fellow sailor, Radioman Seaman Kuster. Later, the accused was given a suspect rights acknowledgment form and signed Kuster's name in order to escape prosecution.

The court considered *Strand* and determined that although the signature was falsely made, the document did not affect Kuster's legal standing in any way. The document did not admit to a crime. It could not be used as evidence in court against Kuster. There was no forgery.

Conclusion

The range of documents that constitute the proper object of forgery is wide. Checks, receipts, and requests for orders or advance pay are among the more obvious. Prescriptions and certain loan documents can also be a basis for forgery, provided that proper conditions are met. If one thing can be gleaned from the cases, it is that the forged document must provide some kind of *quid pro quo* in order to have legal efficacy. If the document does not actually or potentially "cost" someone something, there is probably no legal efficacy, even if the document is falsely made.

The trial counsel can take various steps to avoid appellate reversal of a forgery conviction. The first is to develop an understanding of what legal efficacy entails. An excellent starting point is the *Thomas* case. COMA analyzes, in succinct form, the history of forgery at common law and in military practice, and provides numerous citations.

Second, trial counsel should assess the case realistically. If forgery is clearly demonstrated, then it should be charged. If the legal efficacy element is lacking, it is time to be creative. Other provisions of the Manual may make out a cognizable offense (e.g. Article 134—False or Unauthorized Pass Offenses). Trial counsel should carefully consider the facts and tailor the charge to fit the facts. The facts should not be contorted to fit a forgery charge.

Third, even if forgery exists, the document may not show legal efficacy on its face. In this situation trial counsel must allege the extrinsic facts that demonstrate legal efficacy, and be prepared to prove them. A nebulous assertion that the document possessed potential for "legal harm" will generally not be adequate. If common sense and respect for the legal efficacy requirement are employed, "a trap for unwary prosecutors"[19] can be easily avoided.

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[16] 45 C.M.R. 799 (N.C.M.R. 1972).

[17] 26 M.J. 933 (A.C.M.R. 1988).

[18] 11 M.J. 675 (N.M.C.M.R. 1981).

[19] *Thomas*, 25 M.J. at 402.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The Evolving Entrapment Defense

Introduction

In *United States v. Eckhoff*[1] the Court of Military Appeals recently held that "profit motive does not automatically negate an entrapment defense."[2] The court noted that although the other services had reached the same result prior to Eckhoff's court-martial,[3] the Navy-Marine Corps Court of Military Review followed the contrary "profit-motive-foreclosure" rule[4] until its decision in Eckhoff's case.[5] Accordingly, the Court of Military Appeals and all the courts of review now follow the same rule.

As *Eckhoff* thus illustrates, entrapment remains an evolving defense under military law.[6] This note will briefly review its evolution and selective aspects of its application.

An Overview of Entrapment

The Supreme Court first adopted the entrapment defense in the 1932 decision of *Sorrells v. United States.*[7] Since then, the entrapment defense, in one of its two forms, has been adopted in all fifty states and the federal courts.[8]

Courts and commentators have recognized two alternative theories of entrapment.[9] These approaches are called the subjective or "predisposition" approach, and the objective or "law-abiding person" approach.[10] A threshold requirement common to both theories is the government's inducement of the accused to commit a crime.[11] To raise entrapment, therefore, evidence must be presented that a government agent took action to induce the accused's criminal behavior.[12] Once the inducements are established, the two approaches require different tests to determine whether the accused is entitled to the defense.[13]

Commentators,[14] the Model Penal Code,[15] and a minority of states[16] favor the objective theory. Under the objective

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[1] 27 M.J. 142 (C.M.A. 1988).

[2] *Id.* at 144.

[3] *Id.* at 144 and n.4 (citing United States v. Meyers, 21 M.J. 1007, 1013–14 (A.C.M.R. 1986), and the federal cases cited therein); *see also* United States v. O'Donnell, 22 M.J. 911, 913–14 (A.F.C.M.R. 1986).

[4] *See, e.g.*, United States v. Beltran, 17 M.J. 617 (N.M.C.M.R. 1983). In United States v. Herbert, 1 M.J. 84 (C.M.A. 1975) the Court of Military Appeals observed that the accused's "profit motive foreclosed the defense of entrapment." *Id.* at 85; *see also* United States v. Shultz, 7 M.J. 524, 525 (A.C.M.R. 1979); United States v. Young, 2 M.J. 472, 477 (A.C.M.R. 1975). As later decisions suggest, however, the quoted language from *Herbert* was not intended to establish a *per se* bar to the defense; rather, it merely indicated that the accused in *Herbert* was predisposed to commit the charged offense. *Meyers*, 21 M.J. at 1013; *see also* United States v. Vanzandt, 14 M.J. 332, 343 (C.M.A. 1982).

[5] United States v. Eckhoff, 23 M.J. 875 (N.M.C.M.R. 1987).

[6] As Chief Judge Everett has observed, "Tracking the meanderings of the law of entrapment requires the instincts of a pathfinder and the skills of a surveyor." *Vanzandt*, 14 M.J. at 343.

[7] 287 U.S. 435 (1932). Prior to *Sorrells* the Supreme Court had never expressly adopted the entrapment defense. *See* Casey v. United States, 276 U.S. 413 (1928). For a discussion of entrapment before *Sorrells*, see Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245, 246–49 (1942). *See also* Woo Wai v. United States, 223 F. 412 (9th Cir. 1915). An early military case which discussed the entrapment defense is United States v. McGlenn, 24 C.M.R. 96 (C.M.A. 1957).

[8] *See* Model Penal Code § 2.13 comment 1 (1985). Professor Robinson has noted that "[n]early every American jurisdiction now recognizes some form of the entrapment defense." 2 P. Robinson, Criminal Law Defenses 509 (1984). Tennessee became the last state to adopt the entrapment defense. State v. Jones, 598 S.W.2d 209, 212 (Tenn. 1980).

[9] For a discussion of the conflicting theories of entrapment, see 2 P. Robinson, *supra* note 8, at § 209; W. LaFave & A. Scott, 1 Substantive Criminal Law 599–606; Carlson, *The Act Requirement and the Foundations of the Entrapment Defense*, 73 Va. L. Rev. 1011 (1987); Gallaway, *Due Process: Objective Entrapment's Trojan Horse*, 88 Mil. L. Rev. 103 (1980). *See also Vanzandt*, 14 M.J. at 334–343. The division of thought has continued to the present. 2 P. Robinson, *supra* note 8, at 514; *see, e.g.*, United States v. Hampton, 425 U.S. 484 (1973) (three justices reject the objective theory, two justices concur without foreclosing the objective theory, and three justices dissent and adopt the objective theory).

[10] *See generally* the authorities cited *supra* note 9.

[11] *See* P. Robinson, *supra* note 8, at 515 n.14 (the defense is limited to defendants whose crimes are induced by government agents); W. LaFave & A. Scott, *supra* note 9, at 598–99.

[12] *Vanzandt*, 14 M.J. at 343; Carlson, *supra* note 9, at 1014.

[13] P. Robinson, *supra* note 8, at § 209(b); Carlson, *supra* note 9, at 1014.

[14] *E.g.* P. Robinson, *supra* note 8; Carlson, *supra* note 9.

[15] Model Penal Code § 2.13 (1982).

[16] *See, e.g.*, People v. Burraza, 23 Cal.3d 675, 591 P.2d 947 (1979); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973). Both cases overrule earlier decisions supporting the subjective view. *See also* Grossman v. State, 457 P.2d 226 (Alaska 1969); P. Robinson, *supra* note 8, at 514 n.13; W. LaFave and A. Scott, *supra* note 9, at 601 nn. 33 and 34.

theory of entrapment[17] the focus is on the inducements offered by government agents.[18] The test is whether the police employ methods that create a substantial risk that an offense will be committed by persons other than those who are ready to commit the crime.[19] Under this approach, if the methods used were likely to induce an "ordinary law-abiding citizen" to commit an offense, the accused is entitled to the defense of entrapment.[20]

A majority of the Supreme Court[21] and most states[22] follow the subjective theory of entrapment. A two-step test is used for the subjective theory: 1) was the crime a product of government inducement, and 2) was the accused predisposed to commit the crime?[23] For an accused to prevail on the defense, the fact finder must answer the first question affirmatively and the second question negatively. The key to entrapment, therefore, is the accused's predisposition,[24] which is used to distinguish between traps for the unwary innocent and opportunities for the unwary criminal.[25]

The military follows the subjective approach.[26] Under the subjective theory as applied in the military, the defense of entrapment has three elements: 1) the accused's criminal act must be proven beyond a reasonable doubt; 2) evidence of government inducement must be presented; and 3) the accused must not have been predisposed to commit the offense.[27] Entrapment is thus constituted when the criminal design to commit an offense originated with the government and the accused had no predisposition to commit the offense.[28] The defense precludes the accused's conviction for otherwise criminal conduct when government agents cause an innocent person—i.e., one who is not predisposed—to commit the offense.[29] Government agents may, however, engage in trickery, assist the accused, or provide the accused an opportunity to commit the offense, provided that criminal intent is not created in an innocent person.[30]

Raising the Defense

Entrapment is raised when some admissible evidence demonstrates that the suggestion or inducement to commit a crime originated with a government agent.[31] Although entrapment is theoretically applicable to every offense, it is normally asserted in cases involving drug offenses and other "victimless" crimes.[32] The government, in turn, has been given more latitude in inducing drug offenses than other crimes.[33]

Even though the entrapment defense will completely excuse criminal behavior,[34] defense counsel are often

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[17] The objective theory of entrapment has been asserted in a long line of concurrences and dissents by justices of the Supreme Court. Justice Roberts first argued in *Sorrells* that entrapment is based on the "public policy requirement that the integrity of the judicial process ought not be sullied by the use of improper police conduct to procure convictions." P. Robinson, *supra* note 8, at 513 (construing *Sorrells*). The objective theory has been reiterated in later Supreme Court cases. *See, e.g.*, Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); *Hampton*, 425 U.S. at 495 (Brennan, J., dissenting).

[18] W. LaFave & A. Scott, *supra* note 9, at 601.

[19] *Sorrells*, 287 U.S. at 453 (1932) (Roberts, J., concurring); W. LaFave and A. Scott, *supra* note 9, at 601.

[20] *See* Sherman, 356 U.S. at 383–84 (1958) (Frankfurter, J., concurring).

[21] *See, e.g., Hampton*, 425 U.S. at 488; United States v. Russell, 411 U.S. 423, 433 (1973); *Sherman*, 356 U.S. at 372–73; *Sorrells*, 287 U.S. at 451. In *Sorrells* the Supreme Court adopted the position that the entrapment defense is intended to preclude the conviction of an "otherwise innocent" individual who has been lured into committing a crime he had no predisposition to commit. *Id.* at 442. The opinion "left no doubt that the gravamen of the defense of entrapment was not the propriety of the conduct of the government agents but rather the subjective guilt of the defendant, that is, his predisposition to commit the offense." S. Rep. No. 95–605, Part I, 95th Cong., 1st Sess. 111 (1977) [hereinafter Senate Report].

[22] *See* Carlson, *supra* note 9, at 1014.

[23] W. LaFave and A. Scott, *supra* note 9, at 600.

[24] *See Sorrells*, 287 U.S. at 451; *see also* Senate Report, *supra* note 21.

[25] W. LaFave & A. Scott, *supra* note 9, at 600.

[26] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 916(g) [hereinafter R.C.M.]. R.C.M. 916(g) provides: "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." R.C.M. 916(g) discussion provides further that:

> The "Government" includes agents of the Government and persons cooperating with them (for example, informants). The fact that persons acting for the Government merely afford opportunities or facilities for the commission of the offense does not constitute entrapment. Entrapment occurs only when the criminal conduct is the product of the creative activity of law enforcement officials.
>
> When the defense of entrapment is raised, evidence of uncharged misconduct by the accused of a nature similar to that charged is admissible to show predisposition. *See* Mil. R. Evid. 404(b).

See also Eckhoff, 27 M.J. at 142; *Vanzandt*, 14 M.J. at 332.

[27] *Vanzandt*, 14 M.J. at 343. As to the second element, see United States v. Hill, 655 F.2d 512 (3d Cir. 1981), where expert testimony concerning the defendant's unique susceptibility to inducement was permitted pursuant to Fed. R. Evid. 702 and 405.

[28] R.C.M. 916(g); *Vanzandt*, 14 M.J. 332 (C.M.A. 1982); *see generally* P. Robinson, *supra* note 8, at § 209(b).

[29] *See generally*, W. LaFave & A. Scott, *supra* note 9, at § 5.2 (1986); *Sherman*, 356 U.S. at 376. Professor Robinson observes that while some jurisdictions use the "not-predisposed" formulation of the defense (as does the military), other jurisdictions follow different variations of entrapment; i.e., a defendant is entitled to the entrapment defense who is "not ready to commit" the offense or is "normally law-abiding." P. Robinson, *supra* note 8, at § 209(d)(4).

[30] *See* P. Robinson, *supra* note 8, at § 209(d); *see also* Dep't of Army, Pam 27–9, Military Judges' Benchbook (C1, 15 Feb 1985) para. 5–6 [hereinafter DA Pam 27–9]; *cf.* United States v. Garcia, 1 M.J. 26 (C.M.A. 1975) (the defense of entrapment is not predicated upon the degree of covert police involvement in the criminal activity of the accused).

[31] *Vanzandt*, 14 M.J. at 343.

[32] W. LaFave & A. Scott, *supra* note 9, at 598; *see, e.g., Eckhoff*, 27 M.J. at 142; *Vanzandt*, 14 M.J. at 332; *Herbert*, 1 M.J. at 84.

[33] *Vanzandt*, 14 M.J. at 344 (government is given more latitude because drug offenses are victimless crimes); *see also* United States v. Meyers, 21 M.J. 1007 (A.C.M.R. 1986). Indeed, The Model Penal Code and some jurisdictions make the entrapment defense unavailable for offenses in which causing or threatening bodily injury is an element. *See* P. Robinson, *supra* note 8, at § 209(f); Model Penal Code § 2.13(3) (1982).

[34] Technically, entrapment is a nonexculpatory defense rather than an excuse defense. *See* P. Robinson, *supra* note 8, at § 209(e). "Nonexculpatory defenses arise where an important public policy other than convicting culpable offenders, is protected or furthered by foregoing trial or conviction and punishment." *Id.* at § 201(a). Entrapment can thus be interposed "even where the actor by all measures deserves condemnation and punishment." *Id.; see also id.* at § 26.

reluctant to raise entrapment because of the inherent tactical risks involved.[35] Although not required,[36] in most cases an accused raising entrapment will admit committing the crime.[37] Moreover, once the defense is raised, the government is required to prove predisposition.[38] In meeting this burden, the government is permitted to introduce otherwise inadmissible prior acts of uncharged misconduct.[39]

Military judges have a *sua sponte* duty to instruct on entrapment where evidence of government inducement is presented.[40] Accordingly, entrapment is easily raised and should be treated as a question of fact.[41] Indeed, judges have been repeatedly admonished not to prejudge the issue, but to submit the question of entrapment to the trier of fact.[42]

Although fact dispositive, some general guidelines are nonetheless useful in determining whether an instruction on entrapment is required. First, inasmuch as entrapment applies only to those who are not criminally predisposed, a single request which is readily accepted is typically an insufficient inducement to raise the defense. In *United States v. Suter*[43] for example, the accused willingly sold drugs to an undercover agent after the initial suggestion by the agent.[44] The court held that a single invitation, readily accepted, is not sufficient inducement to raise the defense of entrapment.[45] The court reasoned that only an opportunity to commit a crime was provided, and that this did not constitute the type of inducement required for the defense.[46]

Entrapment is more commonly raised when a government agent makes multiple requests of an accused to commit a crime.[47] Multiple requests, however, will not automatically be considered an inducement requiring an instruction. For example, in *United States v. Sermons*[48] the court found that multiple requests to sell drugs did not constitute an inducement.[49] The fact that the informer approached the accused on several occasions before the sale was accomplished was not dispositive, as a lack of money prevented the accused from buying the drugs.[50] The evidence did not show that government agents instigated criminal activity by an otherwise law-abiding citizen.[51] *Sermons* nevertheless underscores the principle that entrapment is a question of fact.[52] Once the defense is raised, therefore, the military judge should give an instruction and permit the finder of fact to determine whether the accused was entrapped.[53]

As noted earlier, for many years profit motive foreclosed raising the defense of entrapment.[54] Courts reasoned that an accused in these circumstances committed a crime not

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[35] The burden of production, i.e., raising the defense, is on the accused. R.C.M. 916(b); *see also* P. Robinson, *supra* note 8, at 512 n.2. The defense can be raised by the accused, the government, or the court-martial. *See* R.C.M. 916(b) discussion.

[36] *See* Matthews v. United States, 108 S. Ct. 883 (1988).

[37] *See, e.g., Meyers,* 21 M.J. at 1007. In any event, the "alleged criminal act [must be] proven beyond a reasonable doubt." *Vanzandt,* 14 M.J. at 343.

[38] *Vanzandt,* 14 M.J. at 343; *Meyers,* 21 M.J. at 1012, and the cases cited therein.

[39] United States v. Hunter, 22 M.J. 40 (C.M.A. 1986) (evidence of accused's prior uncharged sales of marijuana is admissible to rebut defense of entrapment); *Vanzandt,* 14 M.J. at 343; United States v. Black, 8 M.J. 843 (A.C.M.R.), *pet. denied,* 9 M.J. 253 (C.M.A. 1980); *Meyers,* 21 M.J. at 1012; *accord* United States v. Moschiano, 695 F.2d 236, 244 (7th Cir. 1982); United States v. Mack, 643 F.2d 1119 (5th Cir. 1981); United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied,* 440 U.S. 920 (1979); People v. Dempsey, 82 Ill. App. 3d 699, 37 Ill. Dec. 922, 402 N.E.2d 924 (Ill. App. Ct. 1980); State v. Batiste, 363 So.2d 639 (La. 1978). Of course, courts should weigh the probative value of unrelated criminal acts as showing predisposition against possible prejudice. *See* Hill v. State, 95 Nev. 327, 594 P.2d 699 (1979); *see generally* Mil. Rule Evid. 404.

[40] *See generally,* United States v. Jones, 7 M.J. 441 (C.M.A. 1979); United States v. Stewart, 43 C.M.R. 140 (C.M.A. 1971); United States v. Oisten, 33 C.M.R. 188, 194 (C.M.A. 1963); *see also Eckoff,* 22 M.J. 142 (C.M.A. 1988). The Army's standard entrapment instruction is found at DA Pam 27–9, para. 5–6.

[41] *Vanzandt,* 14 M.J. at 343; United States v. Johnson, 17 M.J. 1056 (A.F.C.M.R. 1983) (military judge erroneously omitted instruction on entrapment after determining that accused was predisposed; predisposition is question for fact finder).

[42] "Any doubt whether the evidence is sufficient to require an instruction [on entrapment] should be resolved in favor of the accused." United States v. Jacobs, 14 M.J. 999, 1002 (A.C.M.R. 1982); *see Johnson,* 17 M.J. at 1058; United States v. Steinruck, 11 M.J. 332, 334 (C.M.A. 1981); *see also* United States v. Sermons, 14 M.J. 350, 353 (C.M.A. 1982) (Fletcher, J., concurring); United States v. Davis, 14 M.J. 628 (A.F.C.M.R. 1982).

[43] 45 C.M.R. 284 (C.M.A. 1972).

[44] *Id.* at 285–86.

[45] *Id.* at 290; *see also Garcia,* 1 M.J. at 29.

[46] *Id.* at 288–89; *see also Sherman,* 356 U.S. at 372.

[47] *See, e.g., Meyers,* 21 M.J. at 1014 (government agent initially suggested to accused that he distribute drugs, and then persistently attempted to cause the accused to distribute drugs for about three weeks).

[48] 14 M.J. 350 (C.M.A. 1982).

[49] *Id.* at 352.

[50] *Id.*

[51] *Id.*

[52] *See id.; see also* United States v. Johnson, 17 M.J. 1056, 1058 (A.F.C.M.R. 1983). In *Meyers,* the Army Court of Military Review wrote:

> Those factors that we would identify as particularly significant in determining whether or not an accused was predisposed to commit an offense include: (1) whether the government made the initial suggestion of criminal activity; (2) whether the accused engaged in the activity for profit; (3) whether the accused was reluctant to engage in the activity and the degree of reluctance shown; and (4) the nature of and the circumstances surrounding the government's inducement, if any. We decline to treat any one factor as on its face being more important than any other. The weight to be given each factor, under the totality of the circumstances, in resolving the issue of predisposition is best left to the fact finder in each individual case.

21 M.J. at 1014 (citation omitted).

[53] *Meyers,* 21 M.J. at 1014; *see* DA Pam 27–9, para. 5–6.

[54] *See, e.g., Herbert,* 1 M.J. 84 (C.M.A. 1985); United States v. Beltran, 17 M.J. 617 (N.M.C.M.R. 1983); *see also Schultz,* 7 M.J. at 525; *Young,* 2 M.J. at 477.

because of police inducement, but due to an overriding desire to make money.[55] Thus, entrapment was seemingly not allowed, as a matter of law, for an accused who sold drugs for a profit, absent police conduct violating fundamental fairness.[56]

In *United States v. Meyers*,[57] decided in 1986, the Army Court of Military Review held that the accused's profit motive did not necessarily foreclose the defense of entrapment.[58] In *Meyers* the accused asked a CID informant for help in obtaining employment during non-duty hours.[59] The informant in turn suggested that the accused sell drugs.[60] Aware of the accused's pressing need for money, the informant met with the accused several times each week for three consecutive weeks.[61] The informant repeatedly told the accused that he could not find a legitimate job for him, but that a good way to get money was to deal in hashish.[62] The accused ultimately agreed to sell hashish after this extensive prodding.[63] The court found that the police agent had thus preyed on the accused's need for money. Instead of foreclosing the defense, the accused's profit motive was merely a factor for consideration when determining the element of predisposition.[64]

More recently, the Court of Military Appeals in *Eckhoff* agreed that profit motive does not necessarily bar an entrapment defense.[65] This conclusion is consistent with federal decisional law.[66] The Supreme Court has likewise reiterated that predisposition, rather than profit motive, is the primary element of entrapment.[67]

Predisposition to Use in Distribution Cases

In many drug distribution cases, an accused who uses drugs is instigated or induced by a government agent to distribute them.[68] The courts have held that predisposition to use drugs is a relevant factor concerning an accused's predisposition to sell drugs.[69] Use, however, is not dispositive of a disposition to distribute. An accused, therefore, is not foreclosed from raising entrapment as to the greater charge of wrongful distribution simply because he is a drug user. The defense of entrapment will succeed if the fact finder determines that even though the accused had previously possessed and used drugs, the idea of selling them was first planted in his mind by government agents.[70]

Such a situation was raised in *United States v. Bailey*.[71] The accused in *Bailey* had previously used and possessed LSD.[72] A government agent asked the accused to supply LSD to a friend.[73] The accused initially refused because he did not want to become involved in the sale of drugs.[74] After a month of daily prodding, the accused sold LSD just to get the informant "off [his] back."[75] Following additional requests of the informant, the accused sold some counterfeit LSD, thinking that when the buyer realized that he had been cheated he would not bother the accused any longer.[76] The trial judge ruled that the accused's guilty plea was provident because predisposition to use and possess LSD negated entrapment as to the sale.[77] The Court of Military Appeals determined that this was "an erroneous legal premise" and found the accused's guilty plea to be improvident.[78] The court ruled that predisposition to use LSD was different from predisposition to sell LSD.[79] The court reasoned that distribution of drugs is a separate offense with a distinct criminal intent.[80]

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[55] *Herbert*, 1 M.J. at 85–86; *accord Russell*, 414 U.S. at 432.

[56] *Herbert*, 1 M.J. at 85–86.

[57] 21 M.J. 1007 (A.C.M.R. 1986).

[58] *Id.* at 1012–13.

[59] *Id.* at 1009.

[60] *Id.* The informant concluded that the accused "would not agree to traffic in drugs unless [he] 'worked on him.'" *Id.*

[61] *Id.* at 1009, 1014.

[62] *Id.*

[63] *Id.* at 1009–10, 1014.

[64] See *supra* note 52 for a list of the factors important to the issue of predisposition according to the court in *Meyers*.

[65] *Eckhoff*, 27 M.J. at 144.

[66] *See* United States v. Fadel, 844 F.2d 1425, 1433 (10th Cir. 1988); United States v. Perez-Leon, 757 F.2d 866, 871 (7th Cir. 1985); United States v. So, 755 F.2d 1350 (9th Cir. 1985); *cf.* United States v. King, 803 F.2d 387 (8th Cir. 1986).

[67] *See Matthews*, 108 S. Ct. at 886.

[68] *See, e.g.*, United States v. Bailey, 21 M.J. 244 (C.M.A. 1986) (accused predisposed to use LSD but not to sell it); United States v. Venus, 15 M.J. 1095 (A.C.M.R. 1983) (accused predisposed to use marijuana but not to sell it).

[69] *Bailey*, 21 M.J. at 246 n.3; *see also Venus*, 15 M.J. at 1085; United States v. Skrzek, 47 C.M.R. 314 (A.C.M.R. 1973).

[70] *Bailey*, 21 M.J. at 246.

[71] 21 M.J. 244 (C.M.A. 1986).

[72] *Id.* at 245.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 246.

[78] *Id.*

[79] *Id.*

[80] *Id.*

The courts have followed this principle in other cases where the issue was whether entrapment was raised; that is, where the accused was predisposed to commit one crime but induced to commit another. For example, entrapment was raised where the accused was predisposed to possess and use small amounts of marijuana but was induced by a government agent to possess a larger quantity.[81] Likewise, entrapment was raised where the accused was predisposed to use and share a small amount of LSD and marijuana but was induced to possess and transfer a larger quantity of high-grade marijuana.[82] In both cases, the predisposition to commit one offense was nonetheless relevant evidence concerning the accused's predisposition to commit the other offense.[83] As such, the finder of fact can consider this predisposition in determining whether entrapment exists.[84]

Entrapment is an Ongoing Defense

The defense of entrapment is an ongoing defense. It applies to the original crime induced by a government agent and to subsequent acts that are part of a course of conduct and the product of the inducement.[85] As Chief Judge Hodson explained in *United States v. Skrzek*,[86] "It would seem to be contrary to public policy to permit narcotics agents to use any trickery to induce a sale, then make subsequent buys, and, by not charging the first sale, insulate subsequent transactions from the effect of their misconduct."[87]

An accused who is initially entrapped, however, is not automatically insulated from culpability for future misconduct. "The initial entrapment, assuming it existed, [does] not immunize [an accused] from criminal liability for subsequent transactions that he readily and willingly undertook."[88]

The continuation of entrapment in a given case is a factual question.[89] When an innocent person commits a crime because of the unlawful inducement of a government agent and soon thereafter commits additional crimes, the influence of the prior act is presumed to continue until the government establishes the contrary.[90] The government bears the burden of overcoming this presumptive taint.[91] An instruction on the continuation of entrapment is thus required when appropriate.[92] Whether judges must instruct on the presumption of a continuing inducement is unsettled; however, instructions must be tailored to cover all offenses that were the product of government inducement.[93] No instruction is required if the later offense is clearly attenuated from the initial inducement.[94]

The Due Process Defense

The due process defense is recognized in military practice.[95] The focus of the due process defense is on the conduct of government agents.[96] If the conduct of a government agent is so outrageous as to violate fundamental fairness mandated by the due process clause of the fifth amendment,[97] a conviction cannot stand.[98] The due process defense is a question of law for the military judge.[99]

If the judge finds that the government conduct was so outrageous as to violate due process, the case should be dismissed. The fact that an accused was predisposed to commit the crime will not foreclose raising the due process defense.[100]

Conclusion

The entrapment defense is still evolving, and decisional law should continue to shape the defense. Several areas remain unsettled and await an authoritative decision by the Court of Military Appeals. Given the prevalence of drug related offenses at courts-martial, military trial practitioners must become conversant with all aspects of entrapment. An advocate's success at trial may ultimately turn upon whether and how the defense of entrapment is applied. MAJ Milhizer.

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[81] United States v. Fredrichs, 49 C.M.R. 765 (A.C.M.R. 1974).

[82] United States v. Jacobs, 14 M.J. 999 (A.C.M.R. 1982).

[83] As the Court of Military Appeals has noted, "evidence of possession and use is [not] irrelevant in demonstrating that a predisposition exists to distribute. Persons who possess and use a controlled substance are logically more likely to have considered distributing it than someone who has no familiarity with drugs." *Bailey*, 21 M.J. at 246 n.3.

[84] *Id.* at 244; *Venus*, 15 M.J. 1095 (A.C.M.R. 1983).

[85] *Sherman*, 356 U.S. at 369; *Bailey*, 21 M.J. at 246.

[86] 47 C.M.R. 314 (A.C.M.R. 1973).

[87] *Id.* at 318 (citing *Sherman*, 356 U.S. at 369, and United States v. Butler, 41 C.M.R. 620 (A.C.M.R. 1969)).

[88] *Meyers*, 21 M.J. at 1012 (quoting United States v. North, 746 F.2d 627, 630 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 1773 (1985)); *accord Bailey*, 21 M.J. at 247–48 (Cox, J., concurring).

[89] United States v. Jursnick, 24 M.J. 504, 507 (A.F.C.M.R. 1987).

[90] *Skrzek*, 47 C.M.R. at 317.

[91] *Id.*; United States v. Shanks, 31 C.M.R. 172 (C.M.A. 1962); *see also Bailey*, 21 M.J. at 247–48 (Cox, J., concurring).

[92] United States v. Jacobs, 14 M.J. 999 (A.C.M.R. 1982), *pet. denied*, 15 M.J. 475 (C.M.A. 1983).

[93] *See Bailey*, 21 M.J. at 247; *Jursnick*, 24 M.J. at 507.

[94] *Bailey*, 21 M.J. at 247.

[95] *Vanzandt*, 14 M.J. at 332. Although recognized in military practice, the due process defense has not been applied in any military case.

[96] United States v. West, 511 F.2d 1083 (3d Cir. 1975).

[97] U.S. Const. amend. V.

[98] *Russell*, 411 U.S. at 432; *Meyers*, 21 M.J. at 1012.

[99] *Vanzandt*, 14 M.J. at 343 n.11; *see* W. LaFave & A. Scott, *supra* note 9, at 608.

[100] *Meyers*, 21 M.J. at 1012.

The Defense of Accident: More Limited Than You Might Think

Introduction

The meaning of the term "accident," as a defense under military law, is much more limited than in the vernacular. Webster's Dictionary, for example, defines accident as being "an event or condition occurring by chance or arising from unknown or remote causes." [101] Consistent with this expansive definition, accuseds will often attempt to characterize their unintentional acts as accidents. Such attempts will usually fail because the conduct at issue does not satisfy the strict requirements of the accident defense. [102] This note will briefly examine the elements of the accident defense under military law and review its application by the military's appellate courts.

An Overview of the Defense

The defense of accident has long been recognized under the common law. [103] Several civilian jurisdictions currently codify some form of the accident defense, [104] and commentators have generally acknowledged its continued vitality. [105] The defense has likewise been historically recognized under military law. [106]

The defense of accident is explicitly set forth in the current version of the Manual for Courts-Martial. [107] The Manual provides that a "death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." [108] The Manual provides further that the "defense of accident is not available when the act which caused the death, injury, or event was a negligent act." [109]

The Court of Military Appeals held that the defense of accident has three elements: 1) the accused must be engaged in an act not prohibited by law, regulation, or order; [110] 2) the lawful act must be shown by some evidence to have been performed in a lawful manner, i.e., with due care and without simple negligence; [111] 3) the act must be done without any unlawful intent. [112]

The defense has the burden of raising the defense, i.e., putting in issue some evidence as to all three elements. [113] This evidence can be introduced during the defense case-in-chief, [114] even if raised only by the testimony of the accused, [115] through the cross-examination of government witnesses, or by the court-martial. [116] Once the accident defense is placed in issue by some evidence, the government has the burden of proving beyond a reasonable doubt that the defense does not exist. [117]

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[101] Webster's Third New International Dictionary of the English Language Unabridged 11 (14th ed. 1961). "Accidental" is defined as "happening or ensuing without design, intent, or obvious motivation or through inattention or carelessness." *Id.*

[102] In this regard, the Court of Military Appeals observed:

> [A]ccident is not synonymous with unintended injury. A particular act may be directed at another without any intention to inflict injury, but if the natural and direct consequence of the act results in injury, the wrong is not excusable because of accident. Accident is an unexpected act, not the unexpected consequence of a deliberate act.

United States v. Pemberton, 36 C.M.R. 239, 240 (C.M.A. 1966) (citation omitted).

[103] *See* 1 M. Hale, Historia Placitorum Coronal 38 (1768) (an act done *per infortunium* is not punishable by death because will and intention, which are not present, as well as an act are required); 3 J.F. Stephen, A History of the Criminal Law of England 15–16 (1883) (describing excusable homicide to include accidental homicide).

[104] *See, e.g.*, Cal. Penal Code § 26 (Five) (West Cum. Supp. 1983) (an actor can avail himself of a defense, where he commits an act or omission constituting an offense "through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence"); *accord* Idaho Code § 18–201(3) (1979); Nev. Rev. Stat. § 194.010(7) (1977); C.Z. Code tit. 6, § 45(a)(7) (1963); P.R. Laws Ann. tit. 33, § 3091 (Cum. Supp. 1981). Ga. Code Ann. § 16–2–2 (Michie 1982) uses slightly different language, referring to "misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, or intention, or criminal negligence." *See* DeBerry v. State, 241 Ga. 204, 243 S.E.2d 864 (1978) (instruction on accident or misfortune should have been given where bullet struck victims by accident although deliberately fired). Arizona has repealed a similar statute. Ariz. Rev. Stat. Ann. § 13–134(3) (under current version, *see id.* at § 13–204 (1978), accident defenses apparently treated as is any other mistake that negates an element); State v. Rupp, 120 Ariz. 490, 586 P.2d 1302 (Ariz. Ct. App. 1978).

[105] *See, e.g.*, Clark and Marshall, A Treatise on the Law of Crimes § 7.02 (7th ed. 1967). Professor Robinson, however, sees the accident defense as having less significance. According to Professor Robinson, the accident defense has become "an unnecessary restatement, in a defense format, of the requirements of the definitional elements of an offense." 1 P. Robinson, Criminal Law Defenses 269 (1984). He concludes that "accident or misfortune defenses are apparently designed to fill a perceived gap left by mistake defense provisions." *Id.* at 270.

[106] *See* W. Winthrop, Military Law and Precedents § 1044 (2d ed. 1920 Reprint) ("Homicide is in law '*excusable*' where it is the result of accident or mishap or where it is committed in self-defence.").

[107] R.C.M. 916(f).

[108] *Id.*

[109] R.C.M. 916(f) discussion.

[110] United States v. Ferguson, 15 M.J. 12, 17 (C.M.A. 1983); *see* United States v. Perry, 36 C.M.R. 377 (C.M.A. 1966); United States v. Sandoval, 15 C.M.R. 61, 67 (C.M.A. 1954).

[111] *Ferguson*, 15 M.J. at 17; *see* United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968); United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963).

[112] *Ferguson*, 15 M.J. at 17; *see* United States v. Femmer, 34 C.M.R. 138 (C.M.A. 1964). The standard instruction provides that the injury must be unforeseeable and unintentional. *See* Dep't of Army, Pam 27–9, Military Judges' Benchbook (May 1982), at para. 5–4.

[113] R.C.M. 916(b); *see Ferguson*, 15 M.J. at 17. This is consistent with the burden of production under civilian law. *See* 1 P. Robinson, *supra* note 5, at 270.

[114] R.C.M. 916(b) discussion.

[115] *Tucker*, 38 C.M.R. at 352–53; *see* Ferguson, 15 M.J. at 17.

[116] *See* R.C.M. 916(b) discussion.

[117] R.C.M. 916(b); *see* United States v. Lincoln, 38 C.M.R. 128 (C.M.A. 1967) (government must prove beyond a reasonable doubt that a special defense does not apply); *cf.* United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963) (victim testified that the injury was inflicted upon him by accident; however, the defense was not raised). This is generally consistent with the allocation and standard for the burden of persuasion in civilian jurisdictions. *See* 1 P. Robinson, *supra* note 105, at 271.

The Nature of the Act: Lawful, Non-Negligent, and Unexpected

If an accident is alleged during the commission of a crime, it is very important to determine whether the crime is a *malum in se*[118] or a *malum prohibitum* offense.[119] The unlawful nature of an accused's actions are apparent when performed in the course of a *malum in se* offense, such as robbery.[120] Accordingly, acts done in the course of a *malum in se* offense are unlawful acts that would not raise the defense of accident. In contrast, acts done in the course of a *malum prohibitum* offense, such as violating a lawful general regulation, are unlawful only if the violation of the general regulation is the proximate cause of the injury.[121]

As noted earlier, the defense of accident is not available when the act that caused the death, injury, or event was a negligent act.[122] To raise the defense, the accused must have acted with the amount of care that a reasonably prudent person would have used under the same or similar circumstances.[123] Carelessly handling a loaded weapon in the presence of others, for example, has been deemed to be negligent, thus precluding the defense of accident.[124]

The same result was obtained in *United States v. Redding*.[125] In *Redding* the accused shot a fellow soldier while playing quick draw.[126] Even though the evidence established that the injury was unintentionally inflicted, no accident instruction was required because the accused had acted negligently.[127] Merely because the accused was not entitled to the defense of accident, however, does not establish his guilt for assault[128] under a culpable negligence theory.[129] The government is still required to prove all elements of offenses beyond a reasonable doubt.

If an act is specifically intended and directed at another, the accident defense is not raised merely because the ultimate consequence of the act is unthinkable or unforeseen.[130] Accident is not synonymous with unintended injury. A particular act may be directed at another without any intention to inflict injury, but if the natural and direct consequence of the act results in injury, the act is not excusable because of accident.[131] For example, accident was not raised where the accused struck the victim with his fist and the victim was cut by a razor blade in the accused's hands.[132] The defense was not available because the injury resulted from an act intentionally directed at the victim and the accused knew he held the razor blade when he committed the act.[133] In contrast, an accused's act of struggling with the victim over a broken bottle was not directed at the victim, but rather was directed at wrestling the bottle from the victim.[134] Accordingly, the defense of accident was raised when the victim was cut.[135]

Accident and Self-Defense

Self-defense[136] can be a lawful response that raises the defense of accident. Negligent self-defense, however, deprives an accused of the accident defense.[137] Specifically, an unexpected and unintentional injury to a third party would be excused if the accused was engaging in lawful self-defense.[138] Self-defense may thus operate in conjunction with the defense of accident to excuse the accused's act, provided

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[118] An act is said to be *malum in se* when it is inherently and essentially evil, i.e., immoral in its nature and injurious in its consequences, without any regard to the fact of it being noticed or punished by the law of the state. This includes virtually all of the offenses cognizable at common law. H. Black, Black's Law Dictionary 1112 (rev. 4th ed. 1968).

[119] An act is said to be *malum prohibitum* which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law, statute, or regulation. *Id.*

[120] *See generally* United States v. Small, 45 C.M.R. 700 (A.C.M.R. 1972).

[121] *Id.* at 703 (the accused carried a pistol in violation of a general regulation, but the violation was not the proximate cause of the injury); *but see* United States v. Sandoval, 15 C.M.R. 61, 67 (C.M.A. 1954) (the court implied that violation of the regulation made the accused's act *per se* illegal, thus precluding the accident defense).

[122] *Ferguson*, 15 M.J. at 17; R.C.M. 916(f) discussion; *see Tucker*, 38 C.M.R. at 349; United States v. Redding, 34 C.M.R. 22 (C.M.A. 1963).

[123] DA Pam 27-9, para. 5-4; *see, e.g., Ferguson*, 15 M.J. at 17 (court found the accused acted negligently when he pointed a loaded shotgun at the victim with the safety off).

[124] In United States v. Moyler, 47 C.M.R. 82 (A.C.M.R. 1973), the Army Court of Military Review found negligence as a matter of law when the accused carried a weapon in a base camp with a magazine inserted, a round chambered, the safety off, and the selector on automatic. *Id.* at 85; *see also* United States v. Sandoval, 15 C.M.R. 61 (C.M.A. 1954) (pushing a door open while holding a loaded weapon did not constitute due care).

[125] 34 C.M.R. 22 (C.M.A. 1963).

[126] *Id.* at 24.

[127] *Id.* at 26.

[128] Uniform Code of Military Justice art. 128, 10 U.S.C. § 938 (1982).

[129] *See, e.g., Tucker*, 38 C.M.R. at 349. Although the accused's negligence will preclude the defense of accident, the government must still prove any criminal offense involving the negligence beyond a reasonable doubt. For example, if proof of negligence or culpable negligence is required to prove the offense, the accused cannot be convicted unless such negligence was a proximate cause of the injury. *See* DA Pam 27-9, para. 5-4, n.2.

[130] *Femmer*, 34 C.M.R. at 140; *see Pemberton*, 36 C.M.R. at 240.

[131] *Pemberton*, 36 C.M.R. at 240.

[132] *Femmer*, 34 C.M.R. at 140.

[133] *Id.* at 140-41.

[134] *Pemberton*, 36 C.M.R. at 240.

[135] *Id.; see also* United States v. Torres-Diaz, 35 C.M.R. 444 (C.M.A. 1965).

[136] *See* R.C.M. 916(e).

[137] *See* United States v. Lett, 9 M.J. 602 (A.F.C.M.R. 1980) (accused's conviction of aggravated assault was affirmed because his use of a knife was a resort to inordinate force and not a passive deterrent; the court recognized that showing the knife as a passive deterrent could be a lawful act necessary to deter a simple assault).

[138] United States v. Taliau, 7 M.J. 845 (A.C.M.R. 1970) (in self-defense accused threw a pipe at his attacker; the pipe struck an innocent bystander when the accused's attacker ducked, and the accused's conviction for aggravated assault was reversed).

that the victim's death or serious injury was the result of the accused's lawful act of self-defense.[139] Put another way, the test is whether the accused would be guilty of assault by battery had the victim not died or suffered serious injury.[140] If the accused acted with reasonable force in self-defense, his acts would be excused even though death is unintended and not a reasonably foreseeable consequence of his acts.

Conclusion

Trial practitioners must understand the strict requirements of the accident defense under military law. They should be careful to distinguish the legal concept of accident from the meaning given the term in common parlance. Only with this knowledge can potential cases be properly evaluated, and ultimately tried and defended. MAJ Milhizer.

Speedy Trial Accountability for Officer Resignations

Introduction

When an officer facing criminal charges submits a resignation in lieu of court-martial, that request must not only be processed within the local command, but must be forwarded to the respective service secretary.[141] Is that processing time charged to the Government for speedy trial purposes under R.C.M. 707? The Court of Military Appeals recently answered that question in *United States v. Higgins.*[142] That decision overules, without mentioning, the Air Force Court of Military Review decision in *United States v. Miniclier.*[143] Furthermore, *Higgins* clarifies the speedy trial aspect of the court's recent decision in *United States v. Woods.*[144] This note addresses the interrelationship among these three cases.

United States v. Higgins

Captain Nicky M. Higgins, an Air Force dentist, was charged with violating lawful commands from his superior officers, wrongfully using drugs (Demerol), and larceny. Facing trial by general court-martial, Captain Higgins submitted a request for resignation in lieu of court-martial. This request was submitted on July 16, 1986, and on October 17, 1986 (94 days later) the Secretary of the Air Force declined to approve the resignation. Upon the denial of the resignation request, the case was set for trial on October 27, but was delayed by the defense until December 8, 1986, 187 days after preferral of charges.

At trial, the defense, accepting 49 days as defense delay, moved to dismiss the charges, alleging that the 120-day rule of R.C.M. 707 had been violated by the government's processing of the resignation. The military judge disagreed, finding the entire 94-day period, used to process the resignation request, to be chargeable to the defense. The judge reasoned that the defense implicitly consented, pursuant to R.C.M. 707(c)(3), to the delay caused by processing of the resignation request. In the alternative, he found delay for "good cause" under R.C.M. 707(c)(8),[145] concluding that such delay is not limited to unusual operating requirements or military exigencies. The Air Force Court of Military Review (AFCMR), however, disagreed and set aside the findings and the sentence.

The Court of Military Appeals reversed AFCMR. Judge Sullivan, writing for a unanimous court, found the officer's request for administrative discharge in lieu of trial to be good cause for delay under R.C.M. 707(c)(8). Accordingly, he excluded from government accountability the 49 days used by those outside the local command to process the resignation request. The court first distinguished this case from those situations considered in prior decisions, where the accused is in pretrial confinement or where the convening authority can act on the discharge requests.[146] Here the accused was not in pretrial confinement (although he was held past his original date of separation for the court-martial), nor could the convening authority approve or deny his resignation request. The court then noted that resignation requests required to be processed *outside* the command are beyond the control of the local command and may impede the disposition of criminal charges at that level.[147] Such requests cannot be considered "another incident of the normal processes of military justice,"[148] but instead are unique and can fit within the definition of "good cause." Therefore, the court held that when a request for discharge must be processed outside the local command, and this processing results in discontinuation of criminal prosecution without defense protest and absent any evidence of government foot-dragging, "good cause" for delay exists under R.C.M. 707(c)(8). Thus, in this case, where the processing *outside* the command took 49 days, that time was excluded, and the case was well within the 120-day limit.[149]

United States v. Miniclier

Counsel should note that the court's decision reverses, *sub silentio,* the Air Force Court of Military Review decision in *United States v. Miniclier.* There an officer-accused's tender of resignation for the good of the service was held to be neither defense consent to delay, nor delay for good

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[139] R.C.M. 916(e)(2) and (3) discussion. In United States v. Jones, 3 M.J. 279 (C.M.A. 1977), the accused's conviction was reversed where he responded to an assault with similar force and the resulting death of the victim was both unexpected and unintended. The court found the accused's conduct raised self-defense.

[140] *Jones,* 3 M.J. at 80.

[141] *See* Army Reg. 635–120, Personnel Separations: Officer Resignations and Discharges (C16, 1 Sept. 1982).

[142] United States v. Higgins, 27 M.J. 150 (C.M.A. 1988).

[143] United States v. Miniclier, 23 M.J. 843 (A.F.C.M.R. 1987).

[144] United States v. Woods, 26 M.J. 372 (C.M.A. 1988).

[145] The "good cause" exclusion has since been renumbered as R.C.M. 707(c)(9).

[146] *See* United States v. Marshall, 47 C.M.R. 409 (C.M.A. 1973); United States v. O'Brien, 48 C.M.R. 42 (C.M.A. 1973).

[147] *Higgins,* 27 M.J. at 153.

[148] *Id.* at 153 (quoting *O'Brien,* 48 C.M.R. at 46).

[149] *Higgins,* 27 M.J. at 153–54.

cause.[150] The Air Force court specifically considered and rejected the argument that officer resignations should be treated differently than those submitted by enlisted personnel because they require approval of those outside the command.[151] It further found that the "good cause" exception is limited by the rule's illustrations: "*unusual* operational requirements and military exigencies."[152] The court found that the processing of an officer's request to resign, even when a senator intervened on the officer's behalf, was a normal incident of pretrial military justice and did not fall within the "good cause" exception to R.C.M. 702.[153] Clearly, the Court of Military Appeals accepted neither the rationale nor the holding of *Miniclier* in its decision in *Higgins*.

United States v. Woods

Additionally, *United States v. Higgins*, in defining government responsibilities in dealing with requests for resignation in lieu of court-martial, reduces the potential for problems created by *United States v. Woods*. In *United States v. Woods* the court held that the Service Secretary could void a court-martial's conviction by approving a request for resignation even after the trial was over.[154] Following *Higgins*, the government can wait until the Secretary acts on the resignation without the fear of any speedy trial implications caused by processing outside the local command, absent government foot-dragging or defense protest. MAJ Williams and MAJ Gerstenlauer.

"Unavailability" and the Sixth Amendment

In *United States v. Burns*[155] the Court of Military Appeals emphasized that "the Sixth Amendment requirement for establishing 'unavailability' may be even more stringent than that imposed by Mil. R. Evid. 804."[156]

At a general court-martial at Fort Jackson, South Carolina, SPC Jerry Burns was found guilty of aggravated assault on Ms. Joann Williams.[157] According to Williams, she accepted a ride with Burns to "downtown Columbia;" instead, however, he kidnapped her and took her to Fort Jackson where he raped, sodomized, and robbed her and cut her on the neck with a knife.

Williams testified at the article 32 investigation and lied about her age and her mother's name. Williams also denied that she was a prostitute, but claimed to be a "creative dancer."[158] Her criminal record showed that she was arrested twice for solicitation to commit prostitution and was found guilty by a juvenile court for possession of marijuana and solicitation to commit prostitution. The staff judge advocate advised the convening authority of the inconsistencies between William's testimony and the facts discovered after the article 32 investigation.

Williams failed to appear as a witness at Burns' court-martial. In order to admit William's testimony from the article 32 investigation, the trial counsel offered evidence of the government's efforts to obtain her presence at trial, apparently to show that she was "unavailable" as required by Mil. R. Evid. 804(b) and the sixth amendment.[159]

A legal specialist from the staff judge advocate's office testified that he had attempted to reach Williams at three different places and twice had sent a subpoena by certified mail to one of the addresses that Williams had mentioned at the article 32 investigation. After sending one of the subpoenas, the legal specialist had received the "returned receipt" with a signature purporting to be that of Williams and dated February 9, 1983. The legal specialist was not, however, familiar with William's signature.

William's counselor at the Department of Youth Services testified that she had attempted to locate Williams. The counselor was told by William's mother, Ms. Bradley, that Williams left home around the first of February and had not been seen since that time. Ms. Bradley denied signing for the subpoena and claimed that only she and Williams had access to her home.

The military judge found Williams to be "unavailable": "there's been more than reasonable activity on the part of the Army . . . to try to contact the individual."[160] He mentioned the efforts by the legal specialist and the juvenile authorities, the presumption of regularity of the U.S. mail, and the limited access to mail delivered to William's home. Because Williams was "unavailable," the military judge admitted her testimony from the article 32 investigation.

At trial, defense counsel vigorously objected, claiming that Burns' sixth amendment confrontation rights were being violated.[161] The Court of Military Appeals agreed:

> In this case, there is no showing that anyone attempted to deliver personally to Ms. Williams a subpoena requiring her attendance at appellant's court-martial, along with "the fees and mileage" required by Article 46 (U.C.M.J.). Thus, the Government never fully invoked the assistance of judicial process to assure her presence, so she could not have been prosecuted under

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[150] *Miniclier*, 23 M.J. at 846.

[151] *Id.* at 847.

[152] *Id.*

[153] *Id.* at 848.

[154] For a further discussion of United States v. Woods, 26 M.J. 372 (C.M.A. 1988), *see* Note, *A New Level of Appellate Relief?*, The Army Lawyer, Oct. 1988, at 47. This note indicates that any delay caused by processing a resignation request is attributable to the government absent a defense request for delay. This is no longer correct, in light of United States v. Higgins, 27 M.J. 150 (C.M.A. 1988).

[155] 27 M.J. 92 (C.M.A. 1988).

[156] 27 M.J. at 96.

[157] Burns was found guilty of "a number of serious offenses, including an aggravated assault on Joann Williams." 27 M.J. at 93.

[158] 27 M.J. at 93.

[159] It is unclear whether the trial counsel stated what standard he was attempting to satisfy. "Trial counsel then announced that he would establish her (Williams) 'unavailability' in order to introduce her former testimony in evidence." 27 M.J. at 94.

[160] 27 M.J. at 95.

[161] 27 M.J. at 95–96.

Article 47 for failing to appear. Having failed to use properly the means at its disposal to compel Ms. Williams' appearance, the Government was not free to claim at trial that she was "unavailable." 27 M.J. at 97–98.

The Court of Military Appeals is reminding trial counsel of the authority to subpoena witnesses; "[s]ervice shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned." [162] In conjunction with the *authority* to subpoena a witness is the *obligation* to make every effort to locate and personally serve a witness, particularly one who is not likely to appear to testify at trial. [163] The government is also held to a higher standard if the witness's former testimony has questionable "indicia of reliability" as in *Burns* where Williams' prior testimony included obvious inconsistencies. [164]

For a witness to be "unavailable" under sixth amendment standards, the government must have "exhausted every reasonable means to secure his live testimony." [165] This requirement anticipates that the government will aggressively attempt to personally serve a subpoena in a situation like the trial counsel faced in *Burns:* a reluctant witness whose reliability was questionable. [166] MAJ Merck.

Contract Law Note

The Prompt Payment Act Amendments of 1988

Introduction

Congress has recently amended the Prompt Payment Act (PPA). [167] The amendments are significant and will require changes to the policies and procedures contained in Office of Management and Budget (OMB) Circular A–125, "Prompt Payment," and the Federal Acquisition Regulation (FAR) implementation at subpart 32.9. This note will highlight some of the major changes to the Act.

Contract Payment Period

The amendments further limit the contracting officer's authority to specify a specific payment period (i.e., the due date for making an invoice payment) for a contract or class of contracts. In the case of commercial items or services the specified payment period must coincide with prevailing private industry contracting practices. [168] For noncommercial items or services the payment period may not exceed thirty days unless it is determined that a longer period is necessary and the determination is approved at a level above the contracting officer. [169] Exactly how these changes will impact upon the FAR requirements is uncertain because the regulation does not presently allow the contracting officer to set a specific payment period. [170]

Also, in addition to the designated payment periods for meat products and perishable agricultural products, Congress has established a ten day payment period for dairy products. [171]

Receipt of Invoices and Return of Defective Invoices

In order to clarify when the payment period starts, which determines the payment due date and the date upon which an interest penalty begins to accrue, Congress has established more specific criteria for determining when an agency has received an invoice from the contractor. An agency is now deemed to have received an invoice on the latter of: 1) the date on which the person or place designated by the agency to *first* receive such invoice actually receives a proper invoice; or 2) on the seventh day after the property is actually delivered or services are actually completed, unless the property or services have been accepted prior to the seventh day or the contract specifies a longer acceptance period. [172] The 1988 amendments also provide that the agency is deemed to have received an invoice on the date of mailing if the agency fails to annotate the invoice with the date of receipt. [173]

Congress has directed that FAR solicitation provisions include a conclusive presumption that the government has accepted supplies or services on the seventh calendar day

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[162] R.C.M. 703(e)(2)(D).

[163] The government did not attempt to locate Williams at all of the addresses mentioned by her, nor was any effort made to contact Williams' boyfriend, allegedly the father of her child.

[164] 27 M.J. at 98.

[165] 27 M.J. at 97.

[166] In his opinion, concurring in the result, Judge Cox remembers his "considerable experience" as a trial judge in Columbia, South Carolina, and empathizes with the difficulties inherent in locating and securing the presence of witnesses at trial. Although Judge Cox does not join with the majority concerning the "unavailability" of Williams, he does find that confrontation was essential because William's statement was "unreliable as a matter of law." 27 M.J. at 98.

[167] Pub. L. No. 97–177, 31 U.S.C. §§ 3901–3906 (1982). For the 1988 amendments see Prompt Payment Act Amendments of 1988, Pub. L. No. 100–496, 102 Stat. 2455 (1988). The Prompt Payment Act was initially conceived in order to accomplish what administrative rules and regulations failed to do—provide incentives for the government to make timely contract payments.

> Those suppliers of goods and services who do business with the Government, in particular small companies, are being treated unfairly by the Government when it fails to pay its bills on time. The companies frequently must borrow money at high interest rates to secure operating funds which would have been available if the Government had paid its bills promptly. The Government itself is also hurt because its reputation as a slow payer discourages businesses from bidding for Government contracts. The Government consequently is deprived of the innovation and lower prices that result from vigorous competitive bidding for contracts.

Legislative History and Purpose of Pub. L. No. 97–177, Prompt Payment Act, 1982 U.S. Code Congressional and Administrative News, p. 111.

[168] Pub. L. No. 100–496, § 11, 102 Stat. 2455 (1988).

[169] *Id.*

[170] Fed. Acquisition Reg. 32.905 (1 Apr. 1984) [hereinafter FAR].

[171] Pub. L. No. 100–496, § 4, 102 Stat. 2455 (1988).

[172] *Id.* § 2.

[173] *Id.*

after the supplies have been delivered or the services have been performed, unless the solicitation provides a longer period determined to be necessary to inspect, test, or evaluate the supplies or services.[174] This will require a change to the FAR five working day constructive acceptance provision.[175] As with the present FAR provision, the new conclusive presumption applies exclusively for the purpose of determining when the government becomes obligated to pay a late payment interest penalty.[176]

The 1988 amendments also reduce from fifteen days to seven days the time available for an agency to return a defective invoice to a contractor, and require the agency to specify the defects.[177] The payment period is reduced by the number of days the agency exceeds the seven days.

Elimination of Interest Penalty Grace Period and Additional Penalties

Prior to the 1988 amendments the Prompt Payment Act provided that the government was not subject to an interest penalty unless it failed to make payment within fifteen days after the payment date.[178] The amendments eliminate this grace period.[179] The late payment interest penalty will now accrue from the day after the payment date.

In addition to the elimination of the grace period, the amendments subject the government to an additional penalty if the government is delinquent in making an interest penalty payment.[180] The government is subject to an added penalty if it fails to pay the interest penalty within ten days after it makes a late contract payment to the contractor, and the contractor makes a written demand for the penalty within forty days after the date the payment is made.

Finally, the amendments provide that a late contract payment due to the temporary unavailability of funds does not excuse the government from accruing an interest penalty for such late payment.[181]

Periodic Payments

Title 31, U.S.C. § 3903(4) has been changed to require periodic payments for partial deliveries or other contract performance during the contract period in supply or service contracts which do not specifically prohibit them.[182] The amendments will require the regulations to provide for periodic payments unless specifically prohibited by the contract, as opposed to allowing periodic payments only when the contract specifically permits them.

In order to qualify for a periodic payment, the contractor must submit an invoice, if required by the contract, and the supplies or services must either be accepted by the government or there must be a determination that the supplies or services conform to the contract requirements.

Interest Penalties on Progress Payments and Retained Amounts in Construction Contracts

The FAR prohibits the payment of interest penalties for late contract financing payments.[183] The 1988 PPA amendments will require changing this prohibition concerning progress payments and certain retained amounts in construction contracts.[184] The amendments will require the government to pay an interest penalty on approved construction contract progress payments which remain unpaid for: 1) more than fourteen days after the payment request is received by the person or place designated to first receive such request, or 2) a longer period if specified in the contract. A payment request cannot be approved unless the application includes a substantiation of the amount requested and a certification by the contractor. The contractor must certify that: 1) the amounts requested are only for performance in accordance with contract specifications, 2) proper payments have been made to its subcontractors, and 3) the application does not include any amount the contractor plans to withhold from a subcontractor.

Just as the government will have to pay interest for withholding earned progress payments, the contractor will be required to pay interest to the government on any unearned progress payments (e.g., performance not in conformance with contract specifications, terms, or conditions).[185]

The government will also be required to pay interest on any amount it has retained pursuant to a contract clause providing for retaining a percentage of progress payments otherwise due to a construction contractor and that are approved for release, if the retained amounts are not paid by the date specified in the contract, or by the thirtieth day after acceptance if there is no contract specified time.

Consistent with the requirement for returning defective invoices, defective construction progress payment requests must be returned to the contractor within seven days of receipt, specifying the defects.[186]

Subcontract Payments in Construction Contracts

The amendments provide that construction contracts must contain a clause that requires the prime contractor to

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[174] *Id.* § 11.

[175] FAR 32.905(a)(2)(ii).

[176] Pub. L. No. 100–496, § 11, 102 Stat. 2455 (1988).

[177] *Id.* § 7.

[178] 31 U.S.C. § 3902 (1982) (as amended by Pub. L. No. 98–216, § 1(6), 98 Stat. 4 (1984)).

[179] Pub. L. No. 100–496, § 3, 102 Stat. 2455 (1988). The contractor does not have to request payment of the late payment interest penalty to be entitled to such payments.

[180] *Id.*

[181] *Id.*

[182] *Id.* § 5.

[183] FAR 32.907–2.

[184] Pub. L. No. 100–496, § 6, 102 Stat. 2455 (1988).

[185] *Id.* § 9.

[186] *Id.* § 6.

pay its subcontractors within seven days from when the government paid the prime contractor.[187] The prime contractor must pay an interest penalty to the subcontractor for failure to pay within the seven days.

Construction contracts must further require the prime contractor to include in each of its subcontracts a provision requiring the subcontractor to include a payment clause conforming to the seven day payment schedule.[188]

Effective Dates of the Amendments

The additional penalty requirement and the provision concerning the unavailability of funds discussed in this note in the second and third paragraphs under the heading "Elimination of Interest Penalty Grace Period and Additional Penalties" shall apply to payments under contracts awarded on or after October 1, 1989.[189]

All of the other additions and changes to the PPA discussed in this note shall apply to payments under contracts awarded, renewed, and contract options exercised during the third fiscal quarter of this fiscal year. MAJ Mellies.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer.*

TJAGSA'S New Toll-Free Phone Number

The Judge Advocate General's School's toll-free telephone number has been changed to: 1–800–444–5914. When you reach the receptionist, request your party or extension. The legal assistance branch extension remains 369.

Professional Responsibility Note

Beneficiary May Sue Lawyer For Costs of Defending Will Contest

In a case of first impression, the U.S. District Court for the District of New Jersey held that a lawyer whose negligence in drafting a will causes a beneficiary to expend estate assets to defend a will contest may be liable to the beneficiary. *Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988). The court denied the lawyer's motion for a summary judgment and concluded that the beneficiary should have the opportunity to prove that the lawyer acted negligently and thereby caused the plaintiff-beneficiary to incur unnecessary legal expenses.

The lawyer in the case helped the decedent, a law partner, prepare and execute several wills during a period of hospitalization preceding his death. The decedent's third wife successfully defended a challenge to the will brought by the decedent's children by a former marriage. After prevailing in the will contest, the plaintiff filed suit against the attorney alleging that he was negligent in failing to firmly establish the testator's testamentary capacity and failing to advise the decedent to record a New Jersey rather than a Florida domicile. The plaintiff claimed that the lawyer's negligence caused her to expend much of the estate to defend the will contest.

The defendant-lawyer argued that he owed no duty to any of the beneficiaries because he was not in privity with them. The District Court concluded that New Jersey law governed the circumstances under which an attorney can assert a lack of privity as a defense when the beneficiary does not lose any rights under the will but nevertheless incurs expenses in defending a will contest.

The court found that, under New Jersey law, a lawyer may be liable to a nonclient for damages for breach of a duty owed to a person who was intended to benefit from the legal services. *Stewart v. Sbarro*, 362 A.2d 581, 142 N.J. Super. 581 (App. Div. 1976). In a subsequent case applying the *Sbarro* doctrine, a New Jersey court concluded that the question of whether the privity requirement is surmounted through reliance depends on four factors: the foreseeability of reliance by the nonclient, the degree of certainty that the nonclient has been harmed, the extent to which the relationship was intended to benefit the nonclient, and the need to prevent future harm without unduly burdening the legal profession. *R.J. Longo Construction Co. Inc. v. Schragger*, 527 A.2d 480 (N.J. Super. Ct. App. Div. 1987). The court in *Schragger* declined, however, to completely eliminate the privity requirement.

Applying the *Schragger* factors, the court in *Rathblott* concluded that a lawyer whose negligence in drafting a will causes an intended beneficiary damages should be liable. The court further rejected the defense effort to distinguish between a beneficiary who loses rights under a will and one who loses half of the estate in defending those rights. The attorney should be liable, according to *Rathblott*, if either loss was due to the attorney's negligence in drafting the will.

The court concluded that it was fairly obvious that the plaintiff was the intended beneficiary of the will. Although the court agreed that the foreseeability of harm from a possible will contest is less than the foreseeability of harm from a beneficiary directly losing rights under a will, the court believed that the plaintiff should be afforded the opportunity to meet the burden of demonstrating foreseeability at a trial on the issue. If the plaintiff can show that harm was foreseeable, the determination of damages will not be too speculative.

The court also rejected the defendant's claim that this approach would unduly burden the legal profession by forcing attorneys to be the insurers of beneficiaries in all will contests. The court concluded that the beneficiary's burden of proving negligence, causation, and damages will be more difficult to meet under these novel fact situations than in the usual negligent will drafting cases.

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[187] *Id.* § 9.

[188] *Id.*

[189] *Id.* § 14.

The decision in *Rathblott* is consistent with the trend in the law to diminish the significance of the privity requirement and to broaden the category of people who can bring actions against negligent will drafters. A substantial number of jurisdictions have held that an attorney whose negligence in drafting a will causes intended beneficiaries to lose rights can be held liable on the theory that these people are third-party beneficiaries of the attorney-client contract. *See, e.g., Lucas v. Hamm,* 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), *cert. denied,* 388 U.S. 987 (1962); *Woodfork v. Sanders,* 248 So. 2d 419 (La. Ct. App. 1981); *Guy v. Liederbach,* 279 Pa. Super. 543, 421 A.2d 333 (1981). As *Rathblott* indicates, a cause of action in tort against the negligent drafter may also lie. *See also Licata v. Spector,* 26 Conn. Supp. 378, 255 A.2d 28 (1966). Major Ingold.

Real Property Notes

Real Estate Foreclosures and Due Process

A case from Alaska may offer some assistance to soldiers who have been subject to foreclosures. In order to sell their homes, soldiers often increase the marketability by letting purchasers assume their attractive VA loans (VA loans are generally attractive because they are offered below market interest rates and are assumable without qualification). When a buyer assumes a soldier's VA loan, the soldier generally remains liable on the original loan. If the purchaser defaults on the loan, the lender will, at some point, initiate a foreclosure. If the soldier (original borrower) has provided the lender with a current address, the lender will likely be required to notify the soldier of the foreclosure at that address. Frequently, however, the soldier fails to notify the lender of the new address, and foreclosure statutes merely require the lender to send notices of foreclosure to the last known address of the borrower. The "last known address" will be the address on the mortgage or deed of trust unless the soldier has notified the lender of a new address. Accordingly, the soldier, even though he has allowed another to assume the loan, should keep the lender informed of any new address.

If the soldier has not provided the lender with a new address and the lender forecloses, sending notice of the foreclosure proceedings to the soldier only at the address on the deed of trust, is the soldier out of luck? Under the laws of most jurisdictions, at least until recently, the lender had probably complied with the notice requirements, and the soldier likely had no remedy based on insufficient notice. However, a recent Alaska case, *Rosenberg v. Smidt,* 727 P.2d 778 (Alaska 1986), may offer some authority upon which to base relief.

In *Rosenberg* the trustee sent notices of foreclosure to the "last known address" of the debtor, who was the prior owner of the property. The notices were returned "unclaimed." The foreclosure sale took place and thereafter the debtor challenged the sale. The court determined that, even though the foreclosure statute did not require it, there was a requirement of due diligence in determining what address is most likely to provide the debtor with notice. The court noted that the lender could have found the address by reasonable inquiry with utility companies, the Department of Motor Vehicles, and through the phone directory. The failure of the trustee to meet this "due diligence" test made the sale voidable.

The reasoning of *Rosenberg* should be used by legal assistance attorneys to protect soldiers' rights to notice prior to foreclosure. Most lenders making loans to soldiers will be on notice as to the soldier's military status. This notice typically comes, at a minimum, from the loan application. When a VA loan is obtained the lender often receives additional information regarding the soldier's military status. Further, if the soldier pays the mortgage by allotment the lender will be on notice as to the military status because it will receive payments directly from a military finance center. Under such circumstances, the lender, who is on notice that the borrower is in the military service and who discovers that the soldier is not living at the old address, should have a duty to make reasonable attempts to locate the soldier. At a minimum, the lender should attempt to contact the soldier through military locators and through the finance center from which payments were received. The issue is due process and, under past Supreme Court authority (*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950)) and *Rosenberg,* those representing foreclosure victims should be able to advance strong arguments placing higher duties of diligence on lenders who foreclose against known service members. Major Mulliken, USAR.

Points Paid for Refinancing Held Not Entirely Deductible in Year Paid

The Tax Court has held that points representing prepaid interest on the refinancing of a three-year balloon loan used to purchase, and secured by, the taxpayer's principal residence were not deductible in the year paid. *Huntsman v. Commissioner,* 91 T.C. 57 (1988). Instead, the Tax Court upheld the Internal Revenue Service position that points paid for refinancing must be deducted ratably over the life of the loan.

In *Huntsman* the homeowners purchased a principal residence financed by a loan secured by a mortgage on the residence and payable in monthly payments with the balance due in three years. The Huntsmans subsequently financed a home improvement with a second mortgage on the home. Just over one year later, the Huntsmans refinanced their residence with a thirty-year loan using the proceeds to pay off the notes secured by the first and second mortgages. The refinanced loan was also secured by a mortgage on the home. To obtain the refinancing, the Huntsmans paid points totalling over $4,000 which they deducted on their tax return for the year during which they were paid.

The Tax Court noted that the code provision allowing a deduction for interest paid on indebtedness, I.R.C. § 163(a), is qualified by another provision in the code requiring that points paid as prepaid interest be amortized over the life of the loan. I.R.C. § 461(g)(2) (West Supp. 1988). Section 461 contains an exception if the points are paid "in connection with the purchase or improvement of, and secured by, a principal residence."

The court reviewed the legislative history behind section 461 and concluded that the phrase "in connection with" should be construed narrowly to apply only to points paid to finance the actual purchase of a principal residence or to finance improvements to such a residence. According to the majority, funds obtained through refinancing transactions, such as the one in this case, are generally used to achieve

financial goals unrelated to home purchase and improvement. Thus, the exception in section 461 was not satisfied and the points must be deducted ratably over the life of the loan. The majority hinted, however, that a different conclusion might be reached in the case of the refinancing of construction or bridge loans.

Three judges dissented, finding that the refinancing transaction was merely a "necessary component" of the purchase of the Huntsman's principal residence. The dissent rejected the majority position that refinancing is used by homeowners only to take advantage of lower interest rates and pointed out that, under the facts of the case, it was necessary for the Huntsmans to refinance to pay off the three-year balloon note.

Legal assistance attorneys should distinguish "points" paid for the use of money from "points paid for specific services, such as the loan origination fee paid in connection with obtaining a Veterans Administration loan. "Points" paid as a charge for services are not deductible as interest. Rev. Rul. 67–297, 1967–2 CB 87. "Points" paid by the taxpayer in connection with the sale of a principal residence are also not deductible, but these "points" may be treated as selling expenses to reduce the amount realized on the sale. Rev. Rul. 68–650, 1968–2 CB 78. Major Ingold.

Tax Note

Expiration of Statute of Limitations Does Not Bar Government From Collecting On Student Loan

The Eighth Circuit Court of Appeals has held that it was proper for the Internal Revenue Service (IRS) to intercept a taxpayer's income tax refunds to pay a defaulted student loan even though the action was taken after the expiration of the statue of limitations. *Thomas v. Bennett,* 856 F.2d 1165 (8th Cir. 1988). The case significantly broadens the ability of the government to exercise tax refund setoffs to pay debts that have traditionally been viewed as uncollectible.

The borrower in the case defaulted on her student loan in 1978. Seven years later the Secretary of Education asked the Secretary of the Treasury to offset the amount owing on the student loan against any tax refund due her under the IRS intercept program. 26 U.S.C. § 6402(d). The Treasury Department diverted the borrower's entire 1985 tax refund and applied it to the defaulted student loan. This procedure was initiated again in 1986 and the borrower brought suit challenging the authority of the Secretary of Education to collect on the student loan through the offset program after the statue of limitations had run.

The borrower argued that the offset was improper because the statute authorizes a refund setoff only if the taxpayer owes a "past due legally enforceable debt." 26 U.S.C. § 6402(d). A debt that is barred by the statute of limitations is not, according to the borrower's claim, a legally enforceable debt.

The applicable statute of limitation provides that "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." 28 U.S.C. § 2415(a). The offsets collected by the IRS were initiated after the six-year statute of limitations had run. The government argued, however, that the running of the statute of limitations under this section does not terminate all of its rights on a contract claim.

The Eighth Circuit agreed with the government's position by holding that the statute merely eliminates one potential remedy, the filing of a cause of action seeking monetary damages. According to the court, the statute of limitations is distinguishable from other claims such as a lack of consideration, bankruptcy, discharge by reason of death or disability, or the assertion of defenses such as fraud that would make the loan substantively unenforceable. The court concluded that, even though the government could not file a lawsuit against the borrower, the unpaid student loan was a legally enforceable debt that could be satisfied by a tax refund setoff. Major Ingold.

Family Law Note

There have been interesting developments in statutory law and case law regarding the Uniformed Services Former Spouses' Protection Act.

Statutory Changes

As for congressional action, the National Defense Authorization Act for Fiscal Year 1989 includes the first pruning back of former spouses' rights since the 1982 enactment of the Former Spouses' Act. The extent of the transitional health care program for 20/20/15 former spouses has been reduced (20/20/15 refers to those former spouses whose military sponsors have completed twenty years of service that is creditable for retired pay purposes, who were married to the sponsor for twenty years, and whose marriages overlapped a minimum of fifteen years of creditable service).

Until now, an unremarried 20/20/15 former spouse has continued to receive full military health care for two years after the date of the divorce. Now, however, he or she generally will receive this benefit for only a one-year period. The sole exception to this limitation arises when the spouse has elected to participate in the civilian group health care plan that DOD negotiated with Mutual of Omaha (called the Uniformed Services Voluntary Insurance Program or "U.S. VIP"). Upon enrollment in the insurance program, the former spouse will continue to receive military health care for an additional year, but only for treatment of preexisting health problems that are excluded from U.S. VIP coverage. Pub. L. 100–456, § 651, 102 Stat. ____ (1988).

This change requires an amendment to the benefits chart that was published in *The Army Lawyer* for October 1988, at pages 55 & 56. Footnote 8 should be replaced with the following statement.

> Unremarried former spouses who meet the "20/20/15 test" (i.e., the member completes at least twenty years of service that is creditable for retired pay purposes, the parties were married for at least twenty years, and the parties' marriage overlapped at least fifteen years of service that is creditable for retired pay purposes) and whose divorces are dated on or after 1 April 1985 are eligible for military health care for a one-year period after the date of the divorce. Additionally, if the former spouse enrolls in the DOD-negotiated civilian health care insurance plan (see note 10), he or she can continue to receive military health

care for treatment of preexisting conditions that are not covered by the insurance plan; this extension of eligibility ends, however, at the end of the second year after the date of the divorce.

Case Law

As predicted earlier (*see The Army Lawyer* for March 1988, at pages 43–44), the Colorado Supreme Court has ruled that vested military pensions are "property." Thus, to the extent that it is attributable to military service performed while parties are married, a military pension constitutes marital property, and it is subject to division upon divorce. *In re Gallo,* 752 P.2d 47 (Colo. 1988).

This ruling is based on the recent case of *In re Grubb,* 745 P.2d 661 (Colo. 1987), wherein a vested but unmatured civilian pension was held to be marital property. *See also In re Nelson,* 746 P.2d 1346 (Colo. 1987) (a vested but contingent and unmatured civilian pension plan is marital property, but the court should take into account the possibility of forfeiture in setting current value). Both the *Grubb* and *Gallo* decisions expressly overrule any contrary holding in *Ellis v. Ellis,* 36 Colo. App. 234, 538 P.2d 1347 (1975), *aff'd,* 191 Colo. 317, 552 P.2d 506 (1976), which had held that military pensions (whether vested or not) do not constitute a property interest.

Several courts have struggled with the question of whether vesting should have an effect on the treatment of retired pay. For example, a New Jersey court recently rejected an argument that military pensions must be vested before courts can divide them. *Whitfield v. Whitfield,* 222 N.J. Super. 36 535 A.2d 986 (N.J. Super. Ct. App. Div. 1987). An Alaska court came to the same conclusion regarding civilian pension plans. *Laing v. Laing,* 741 P.2d 649 (Alaska 1987). The *Laing* opinion is particularly instructive because the court surveyed the law on this question and concluded that the overwhelming trend is for courts to treat nonvested pensions as marital property.

As *Gallo* shows, however, the trend is not universal. North Carolina also is notable for ruling that only vested retirement plans constitute marital property. The limitation here is statutory, since marital property is defined as "all vested pension, retirement, and other deferred compensation rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act." N.C. Gen. Stat. § 50–20(b)(1) (1987).

To some extent, the Colorado and North Carolina cases beg the question since it is hard to define just when military retired pay becomes "vested." In fact, military pensions never vest, at least not in the same sense that civilian pension plans become vested. North Carolina courts have nonetheless sought to provide guidance, based on interpretations of federal statutory provisions pertaining to military retired pay. The general, and somewhat surprising, conclusion has been that an enlisted person's retired pay vests only upon completion of thirty years of service, while an officer's retired pay vests at twenty years of service. *Seifert v. Seifert,* 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd,* 319 N.C. 367, 354 S.E.2d 506 (1987).

A North Carolina court recently had occasion to take another, closer look at the vesting question. In *Milam v. Milam,* 373 S.E.2d 459 (N.C. Ct. App. 1988), a warrant officer had nineteen years and five months of creditable service on the date of separation (which is the valuation date in North Carolina). Does the soon-to-be former spouse lose all interest in the retired pay on these facts? The trial court said, "Yes," but on appeal the spouse won. The higher court noted that Chief Milam had passed the "lock-in" point of eighteen years, and thus he was guaranteed the opportunity to complete twenty years of service, notwithstanding any passovers, and then receive retired pay. The court held that this was sufficient to meet the statutory requirement of "vesting." Interestingly, the North Carolina court reached this conclusion by purporting to follow Colorado's *Grubb* decision, which opined that " '[v]esting' occurs when an employee has completed the minimum terms of employment necessary to be entitled to receive retirement pay at some point in the future." Analytically, this is not completely true. At the time of divorce, Chief Milam had not in fact "completed the minimum . . . necessary to be entitled to receive retired pay;" rather, he had only completed sufficient service to be assured the right to remain on active duty until he could become retirement eligible. Nonetheless, for the North Carolina court, reaching the "lock-in" point constituted "vesting." Because the decision is at least nominally based on Colorado precedent, perhaps Colorado courts will follow suit when they are confronted with a similar fact situation. Major Guilford.

Consumer Law Notes

The Magic Signature Block

Your client has written letters, you have written letters, you have phoned the offending merchant, you have contacted the corporate headquarters' consumer assistance branch, and none of your efforts have yielded results. If only you were admitted to this bar, you would love to get these guys into court. You know that if you just had some "clout," they would listen to your client's claims of unconscionability or deception, rescind the contract, and refund the deposit. You would even do without the apology. Is there any possibility of success?

Consumers often find that a letter to the consumer protection division of the state attorney general's (AG) office can be more effective than reams of correspondence from the legal assistance attorney to the merchant. Have your client forward a complaint to the AG's office identifying the remedy sought (often this will be rescission of the contract with a refund of any deposits or periodic payments made to date) and carefully explaining the nature of the deceptive advertisement, the nonconformity with promised standards of quality, the undisclosed fees attending credit repayment, or other variances between your client's understanding of the merchant's obligation and the merchant's willingness to perform.

Many AG's offices will routinely generate a cover letter informing the seller that they have initiated an investigation of the complaint (attaching a copy of your client's correspondence) and requesting that the seller explain their business practice with respect to the alleged injustice. At this point, it is often easier and more economical for the merchant to comply with your client's request for rescission and reimbursement (and inform the AG of this action) than to respond to the AG's inquiry. Many AG's offices are well aware that generation of the cover letter is not costly and can reap enormous dividends. Communicate with the AG's

office to determine what you can do to help them help you; then exploit *their* clout to your client's advantage!

Door-to-Door Sales Rule Amended

The Federal Trade Commission has amended its Rule mandating a cooling-off period for "door-to-door sales" (also called home solicitations). 16 C.F.R. Part 429. This Rule generally gives a buyer three business days in which to rescind a contract for the purchase of consumer goods or services with a purchase price of $25 or more in which the buyer's agreement to purchase is made at a place other than the seller's place of business. The Rule was designed to protect consumers from aggressive or obstinate sales representatives who refuse to leave a buyer's doorstep or home until a sale is consummated, causing the consumer to enter an unwanted contract merely so the seller will leave.

Because the Rule is applicable to those who sell at a place other than their "place of business," a strict application of the Rule would permit rescission where, for example, the buyer purchases a new car at a "tent sale" in which various dealerships sell cars at a temporary joint location. Because the car sellers' places of business are their dealerships, such purchases would be subject to the right to rescind even though the reason for the Rule, concern that buyers would be coerced into unwanted obligations by a seller who trapped them in their homes, did not exist. Similarly, under the strict language of the Rule, those who purchase crafts from a fair, shopping mall, or other location visited for the specific purpose of making such purchases would have a three-day right to rescind if the seller maintained a place of business elsewhere.

To avoid these anomalous results, the Federal Trade Commission has granted exemptions from the Rule's application, effective December 12, 1988, to "sellers of automobiles at public auctions and tent sales and [sellers of] arts and crafts at fairs." 53 Fed. Reg. 45,455 (1988) (to be codified at 16 C.F.R. § (a) and (b) (1988). In the supplementary information attending the rule change, the Commission indicates that "[t]he exemption for automobile sales is limited to sellers who have at least one permanent place of business," but notes that "[a]ny automobile sellers who are itinerant, a group of salespeople [at whom] the Rule was aimed . . ., will continue to be covered by the Rule." 53 Fed. Reg. at 45,456 and 45,458. The supplementary information additionally notes that "[t]he exemption for sellers of arts and crafts sold at fairs includes arts and crafts events at, for example, shopping malls, civic centers, community centers or schools." 53 Fed. Reg. at 45,458.

The revisions to the Rule did, however, expressly reaffirm the exclusion of telephonic solicitations from the definition of "door-to-door" sales, noting that there is "no evidentiary record establishing the need" for this additional protection. 53 Fed. Reg. at 45,457. The Commission is, however, currently considering an amendment to the Mail Order Merchandise Rule, 16 C.F.R. Part 435 (1988),[190] to include within that rule telephonic solicitation of consumer orders. 53 Fed. Reg. 43,448 (1988).

Home Equity Loan Consumer Protection Act of 1988

The Home Equity Loan Consumer Protection Act of 1988 (H.R. 3011) was signed by the President on November 23, 1988. The Act amends the Truth in Lending Act (15 U.S.C. §§ 1601–1667 (1982)) by requiring specific disclosures and setting advertising limits for open-end consumer credit plans secured by the consumer's principal dwelling, also known as home equity loans. Under the new law, open-end home equity loan applications must include disclosure of the annual percentage rate of finance charge, any fees required to obtain and use the account, and a statement alerting consumers to the fact that they risk losing their dwellings if they default on the loan. If the loan carries a variable rate, the creditor must disclose, among other things, the manner and timing of rate changes, the lifetime and annual rate caps under the plan, and examples showing the annual percentage rate and minimum payment under each repayment option.

Loan applications must be accompanied by a pamphlet published by the Federal Reserve Board containing a general description of open-end home equity loan plans, the terms and conditions under which such loans are generally extended, and a discussion of the potential advantages and disadvantages of such plans.

Fair Credit and Charge Card Disclosure Act

The Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100–583 (1988), enacted on November 3, 1988, and effective in April 1989, amends the Truth in Lending Act (15 U.S.C. §§ 1601–1667 (1982)) to require more detailed uniform disclosure by credit and charge card issuers. Under the new law, card issuers will be required to disclose the annual percentage rate, any annual or membership fees, any grace periods during which the consumer would be able to pay the balance of the account without incurring a finance charge, and the balance calculation method in all direct mail, telephone, magazine, catalog, and other solicitations and applications.

[190] Among other things, the Mail Order Rule requires sellers to have a reasonable basis for claims they make about shipping time, to notify consumers of delay beyond the advertised time of shipment or, absent a promised shipping date, beyond 30 days, and to permit cancellation of delayed orders.

Claims Report

United States Army Claims Service

Assessment of Disability in Tort Cases

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Introduction

One of the most troubling aspects of damage evaluation in tort cases is the assessment of the degree of disability suffered by an injured claimant or plaintiff. This article will assist claims attorneys in locating health care professionals who can best measure the existence and degree of disability in major musculoskeletal injury cases, and will present a basic shell of questions that can be used (and built upon) to carry out a thorough medical evaluation of a claimant's disability. Attorneys, health care providers, consultants and others routinely use the terms "disability" and "impairment" interchangeably. "Disability," however, as a term of art in worker's compensation and Social Security disability determination cases, refers solely to impairment of an individual's capacity to work.[1] Claims and tort litigation attorneys are necessarily concerned not only about loss of work capacity, but with the total impairment of an injured claimant or plaintiff.[2] Therefore, consultants selected to carry out "disability" evaluations for the government should be reminded to evaluate and comment upon total impairment, not just impairment of work capacity. While the task of attorneys and judges who must assess the monetary value of disability oftentimes seems insuperable, evidence shows that physicians also have great difficulty quantifying the degree and even the existence of impairment in patients being evaluated for disability. A recent study at the University of North Carolina compared the assessment of disability of low back pain patients by twenty-six private physician disability consultants and ten physicians employed by the Social Security Disability Agency.[3] The physicians considered five criteria in making their assessments: physical examination, mobility, pain, X-ray findings, and work history. Each of the forty-eight cases was rated on a scale of 0.0 to 1.0, corresponding to the degree of certainty of each physician that the patient was in fact disabled. Mean certainties ranged from 0.0 to 0.61, evidencing a wide range of disagreement among physicians on the existence of disability in individual cases. The consultants tended to conclude that subjects were disabled far more frequently than did Social Security-employed physicians.[4] Collectively, the examiners' conclusions about disability were skewed in favor of purely objective criteria, including X-ray findings and neurologic signs such as reflex inhibition, and largely ignored the subjective criterion of complaint of pain.[5]

Because it is largely subjective in nature, pain is the most difficult parameter of disability to assess. Pain is a complex psychophysiological phenomenon.[6] It is never exclusively physical nor exclusively psychological in nature; it always has both components. Relevant to tort claims, pain in the limbs, trunk, head or neck may derive from a myriad of causes associated with physical force incident to a traumatic event. In cases where the root cause of pain cannot be readily determined, health care providers and attorneys sometimes disregard pain complaints as a parameter of disability. To the claimant, however, pain is usually the most significant and impairing parameter of the disability grid. While this discussion and the proposed shell of medical questions focus on neck and back pain cases [the most frequent claimant complaints in trauma cases,][7] the principles stated have general applicability to all other parameters of disability and to all types of injury cases. Back pain in trauma cases results from muscle, ligamentous or other soft tissue strain eighty percent of the time.[8] It may, however, be the result of disk disease, a fracture, or another etiologic factor. The pain may be localized to a specific area or it may radiate to the buttocks or limbs, or be segmentally localized in the limbs. Differential diagnosis is of utmost importance to the claims attorney assessing the case. Early, definitive diagnosis and functional disability evaluation in major injury cases best serves the interests of both the government and the claimant. For the claimant, prompt evaluation and definitive diagnosis translate into effective treatment directed at a specific problem and earlier resolution of symptoms. It also speeds the rehabilitation process.

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[1] *See* Carey, Fletcher, Fletcher and Earp, *Social Security Disability Determinations: Knowledge and Attitudes of Consultative Physicians*, 25 Medical Care 267–68 (1987) [hereinafter *Knowledge and Attitudes*] (citing U.S. Dep't of Health and Human Services, Disability Evaluation Under Social Security: A Handbook for Physicians (1986)).

[2] This total impairment, or "functional disability" has three components: impairment of physical function, emotional function, and social function, in both work and nonwork settings. Jette and Cleary, *Functional Disability Assessment*, 67 Am. Physical Therapy A. 1854 (1987).

[3] Carey, Hadler, Gillings, Stinnett and Wallstein, *Medical Disability Assessment of the Back Pain Patient for the Social Security Administration: The Weighting of Presenting Clinical Features*, 41 J. Clinical Epidemiology 691 (1988) [hereinafter *Medical Disability Assessment*].

[4] *Id.* at 693.

[5] *Id.* at 695–96.

[6] Skultety, *Introduction to the Management of Chronic Pain*, 5 J. Orthopaedic and Sports Physical Therapy 305 (1984).

[7] For example, of 53 California-based trauma-related tort claims at U.S. Army Claims Service on October 1, 1988, 47 involved primary complaints of neck or back pain.

[8] B. Raney & R. Brashear, Shands' Handbook of Orthopedic Surgery 310–11 (8th ed. 1971).

For the government, such intervention helps to mitigate damages, rather than having long-term, nonspecific treatment transform an acute problem into a chronic one, and cause damages to mount unnecessarily.

Medical and Allied Health Consultants

The range of health care providers that can provide an evaluation of a disability case is nearly as wide as the potential causes for disability, and includes, among others, medical doctors (including orthopedists, neurologists, neurosurgeons, physiatrists, and other specialists), osteopaths, physical therapists, and chiropractors. Each of these practitioners can provide input important to the claims attorney; unfortunately, none of them typically evaluates broadly enough to give the complete picture that a claims attorney requires. For example, orthopedists and neurosurgeons are adept at diagnosing disk problems, based on history, physical examination and confirmatory studies such as computerized tomography,[9] magnetic resonance imaging,[10] and myelography.[11] Unfortunately, however, they often do not perform or document a comprehensive muscle strength evaluation, nor do they normally carry out psychological prescreening of patients. Physiatric consultants perform electromyography[12] and nerve conduction velocity studies[13] to assess muscle and nerve function, but normally do not conduct work capacity evaluations of patients. Physical therapists conduct comprehensive muscle testing, often using sophisticated isokinetic testing equipment[14] with graphic readouts of muscle functioning. Physical therapists also conduct pain[15] and work capacity evaluations,[16] and are accustomed to observing and documenting how patients carry out activities of daily living, including how they behave in the waiting room, how they undress and dress, and whether they are putting forth maximal effort during testing. They cannot, however, render a diagnosis, nor order medical imaging tests. Chiropractors, whose mainstay is treating back patients, operate largely outside of the mainstream of hospital-based, physician-dominated health care, and therefore have only limited access to non-chiropractic consultants and facilities necessary to the complete picture required by the claims attorney.[17] Other health professionals, including occupational therapists[18] and vocational rehabilitation specialists,[19] also can provide important input to the complete medical picture of a disability claimant.

Disability Evaluations

Medical consultants carry out approximately 300,000 disability evaluations in the United States each year.[20] Although over half of the physician consultants believe that they cannot accurately assess a patient's disability on the

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[9] Computerized tomography (CT) is computer-enhanced, millimeters-thick multiple x-ray imaging of cross-sections of the body. Variations in tissue density across the image appear as shades of gray. Although CT images soft tissue, including ligaments, nerve roots and disks, it is most effective in confirming diagnoses like vertebral body and neural arch fractures and spinal cord compression. Orthopaedic Knowledge Update 2, Am. Academy of Orthopaedic Surgeons 160, 164, 315 (1987) [hereinafter Ortho Update]. *See also* M. Moskowitz and M. Osband, The Complete Book of Medical Tests 115–18 (1984); K. Pagana and T. Pagana, Understanding Medical Testing 100–02 (1983) [hereinafter Understanding Testing]. Images obtained can be formatted into coronal, sagittal or three-dimensional images.

[10] Magnetic resonance imaging (MRI) uses a static magnetic field and radio waves to image body tissues based on their relative proton densities. Ortho Update, *supra* note 9, at 159, 315. Because MRI is non-invasive and uses no ionizing radiation, it is considered a safe procedure, except for patients with pacemakers, aneurysm clips, or other ferromagnetic implants. *Id.* at 159. It also provides the best imaging of soft tissue lesions, including subtle paraspinal muscle tears. *Id.* at 164–65.

[11] Myelography is an invasive procedure that involves lumbar puncture, penetration of the subarachnoid space of the spinal canal, insertion of water-soluble dye, fluoroscopy, and x-ray to image the spinal canal. *Id.* at 315; Understanding Testing, *supra* note 9, at 103–04. It is primarily used to confirm diagnoses such as herniated lumbar disk, spinal tumor, and nerve root avulsion. Ortho Update, *supra* note 9, at 164, 315. Myelography has significant potential side-effects, ranging from headache and nausea to seizures, meningitis, and (rarely) herniation of the brain into the upper spinal canal. *Id.* at 315; Understanding Testing, *supra* note 9, at 112.

[12] Electromyography is an invasive procedure that uses a small needle as a recording electrode to assess muscle function by measuring electrical activity of a muscle at rest and during contraction. Understanding Tests, *supra* note 9, at 114–15.

[13] Nerve conduction velocity studies measure the traveling time of electrical impulses along peripheral nerves to the muscles they innervate. By comparing the conduction velocity in affected and unaffected sides of the body, peripheral nerve injury or dysfunction can be detected. This procedure is non-invasive, but inflicts a mild electrical shock on the patient. Understanding Tests, *supra* note 9, at 113–14.

[14] Isokinetic testing is used to measure torque (muscle power) as joints actively move through their ranges of motion with resistance at constant regulated speeds. *See generally* Seeds, Levene and Goldberg, *Abnormao Patient Data for the Isostation B100*, 10 J. Orthopaedic and Sports Physical Therapy 121 (1988) (discussing the value of isokinetic testing of low back injury patients). *But see* Rothstein, Lamb and Mayhew, *Clinical Uses of Isokinetic Measurements*, 67 J. Am. Physical Therapy A. 1840 (1987) (discounting the value of isokinetic measurements in disability evaluations). For a brief description of one isokinetic device, the Lido Back System, see *Malingerers Experience a Real Backlash*, Newsweek, Aug. 15, 1988, at 40.

[15] For a general discussion of pain evaluation, see R. Cailliet, Soft Tissue Pain and Disability 18–45 (2d ed. 1988). Physical therapists sometimes use ultrahigh frequency electrical stimulation devices that provide surface hyperstimulation of pain trigger points to evaluate acute and chronic pain. Interview, Genevieve M. Green, P.T., Isokinetic Specialist, The Testing Center, in Washington, D.C. (Oct. 17, 1988) [hereinafter Interview]. *See also* Jette, *Effect of Different Forms of Transcutaneous Electrical Nerve Stimulation on Experimental Pain*, 66 J. Am. Physical Therapy A. 187 (1986). For clinical monographs on transcutaneous electrical nerve stimulation, see R. Sternbach, TENS: A Pain Management Alternative (1984).

[16] In work capacity evaluations, machines with adaptive devices such as steering wheels, cranks, saws, hammers, door knobs, jar lids, etc., and weights for lifting are used at varying degrees of resistance to simulate work activities. These devices can measure a patient's work effort in inch-ounce (cf. foot-pound) work units. In contrast to work capacity evaluations, work hardening simulations replicate a patient's specific work environment over a meaningful work period, e.g., several hours. Interview, *supra note* 15.

[17] For an illustration of the problem, see Wilk v. AMA, 671 F. Supp. 1465 (N.D. Ill. 1987).

[18] Occupational therapists have a B.S. or higher degree, and are nationally certified and registered with the American Occupational Therapy Association. They help patients to develop skills in carrying out activities of daily living, vocational skills, and fine motor hand skills. They also make and apply orthoses, and treat psychologically impaired patients. R. Gray and L. Gordy, 4 Attorneys' Textbook of Medicine 182–6 (1988) [hereinafter Attorneys' Textbook].

[19] Vocational or rehabilitation specialists have a B.S. or higher degree, and are certified by a national board, and licensed in some states. They evaluate patients for entry or reentry into occupations chosen by and best suited for the individual patients, locate vocational training and place patients in the community. Attorneys' Textbook, *supra* note 18, at 182–6—182–7.

[20] *Medical Disability Assessment*, *supra* note 3, at 691.

basis of a single visit,[21] this is precisely what attorneys routinely ask and expect of them. Studies also reveal that the competency of consultants to carry out disability evaluations varies greatly among individual practitioners.[22] Claims attorneys must, therefore, carefully choose their consultants and facilities and participate in claimant-specific question development with consultants in order to minimize the risk of invalid examinations and findings. The ideal medical disability evaluation should include the best of what each of the aforementioned practitioners has to offer in the complete evaluation of the patient.[23] The facility examining the claimant should conduct psychological prescreening and have the capability to conduct radiological and other diagnostic tests in-house, or readily refer such patients to outside consultants. The staff should observe claimants from when they enter the clinic until they depart, and comment on how they carry out activities of daily living incident to the examination. The facility should be able to conduct comprehensive muscle function testing, and relate deficiencies to the claimant's symptoms and complaints. Objective data readouts that can be provided to the claimant's attorney and government medical experts should also be available. The facility should be able to assess the claimant's degree of disability, including permanent impairment, if applicable, and document how the examiner arrived at a given disability rating.[24]

Of greatest importance, and almost uniformly absent in medical evaluations, is the need to discretely and tactfully test and comment upon whether and to what degree the claimant displays "compensatory pain," i.e. is malingering or exaggerating symptoms for secondary gain, financial or otherwise.[25] Almost half of the disability consultants in a recent study opined that disability claimants in general exaggerated their symptoms and that a majority of them could work if they "tried hard enough."[26] Yet, physicians generally fail to document such opinions when warranted in individual cases. When requesting a medical evaluation, the claims attorney should always request that diagnostic tests, such as the straight leg raise for low back lesions,[27] be augmented with confirmatory tests[28] to rule out compensatory syndrome, and that the examiner render an opinion as to whether the claimant is malingering or exaggerating symptoms. While the cost of an examination[29] does not justify a complete disability evaluation in routine injury cases, the benefits realized in the form of accurate damages assessment mandate such an examination in major injury cases. The facility that the claims attorney employs to carry out a disability evaluation is a matter to be negotiated between the claims attorney and the claimant or the claimant's attorney, if represented by one.[30] Even if the claimant's attorney will not agree to a formal independent medical evaluation[31] because of unwillingness to be bound by the results or for some other reason, the claims attorney still may need a comprehensive disability evaluation to accurately assess damages.[32] This can often be accomplished at a military medical center near to the claimant's residence, where medical and allied health consultants are readily available. The claims attorney should ensure, however, that the military facility can complete the examination and render a written report in a relatively short time period. Alternatives include university medical centers, large teaching hospitals, and independent disability evaluation clinics that emphasize a multidisciplinary approach to evaluation.

A Basic Shell of Disability Evaluation Questions

The following is a set of basic questions for a disability medical evaluation of a claimant that can be proposed to a claimant or his attorney, and that should be required of an examining facility carrying out the evaluation. Material enclosed in brackets is explanatory information for claims officers and not part of the shell of questions.

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[21] *Knowledge and Attitudes, supra* note 1, at 271.

[22] *Id.* at 269–74. *See also* Carey and Hadler, *The Role of the Primary Physician in Disability Determination for Social Security Insurance and Workers' Compensation,* 104 Annals of Internal Medicine 706 (1986) [hereinafter *Role of Physicians in Disability Determination*].

[23] Because consultants from different medical and allied health specialties tend individually to give an imcomplete picture of a claimant's disability status, it is recommended that a disability evaluation be carried out in a multidisciplinary setting, with physician oversight.

[24] The American Medical Association's permanent impairment guidelines assign percentage regional and "whole man" impairment based on loss of active range of motion, loss of muscle strength, pain, and sensory deficit in affected limbs or the spine. *See* Guides to the Evaluation of Permanent Impairment, American Medical Association (1971), *reprinted in* Attorneys' Textbook, *supra* note 18, at 181–3—181–90. One study suggests that a majority of physician disability consultants are not well informed on how to assign degrees of disability. *See Knowledge and Attitudes, supra* note 1, at 269–71.

[25] *See generally* H. Keim, Low Back Pain 24–26, CIBA Clinical Symposia 25:3 (1973) [hereinafter Low Back Pain].

[26] See *Knowledge and Attitudes, supra* note 1, at 271.

[27] Passive elevation of a supine patient's extended leg causes tension in the lumbosacral nerve roots, and is considered a positive sign of disk herniation if it produces sciatica (severe shooting pain) in the patient's affected leg. *See* L. Day, E. Bovill, P. Trafton, H. Cohen, & F. Jergensen, Orthopedics 1004, Current Surgical Diagnosis and Treatment (L. Way 7th ed. 1985).

[28] For examples of confirmatory tests for low back pain, including the sitting straight leg raise test, elevation of the patient's arms overhead, etc., see Low Back Pain, *supra* note 25, at 25; R. Cailliet, Understand Your Backache 85 (1984).

[29] The comparative cost of a back disability evaluation at two facilities in metropolitan Washington, D.C. was $235.00 (public rehabilitation hospital—physician consult with report; no x-rays or tests) and $680.00 (private clinic—multidisciplinary consultation with report, psychological prescreen, isokinetic muscle testing with graphic readout), as of 11 October 1988.

[30] One study suggests that the claimant's primary physician cannot carry out a disability evaluation for attorneys, because of the inherent conflict between the physician's roles as medical care provider and source of information to the attorneys adjudicating the case. *See Role of Physician in Disability Determination, supra* note 22, at 709–10.

[31] *See* Army Reg. 27–20, Legal Services—Claims, para. 2–16 (10 July 1987) [hereinafter AR 27–20]. The claimant and claims officer must agree in advance to be bound by the results of an independent medical examination. *Id.*, para. 2–16a(1)–(2).

[32] If the parties cannot agree on an independent medical examination, then the government can require the claimant to undergo a medical examination by an examiner chosen by the government. Costs for such an examination are normally borne by the government, while the claimant pays for his or her own expenses incident to the examination. AR 27–20, para. 2–16e. While claimants and their attorneys normally agree to government ordered medical exams in order to effect a favorable settlement decision, claims attorneys may encounter problems in enforcing the requirement.

(i) [Begin with a brief claimant history. Provide the claimant's medical records.][33] Give a brief patient history.

(ii) Evaluate the patient's range of motion (ROM) in all four limbs and the cervical, thoracic and lumbar spine.[34] If not within normal limits (WNL), describe the deficits. Are postural defects noted?[35] If so, describe.

(iii) Evaluate the patient's muscle strength.[36] Conduct: 1) gross manual muscle testing, 2) isokinetic muscle performance testing (with readout, if available) and 3) isometric muscle testing [confirmatory testing for level of effort]. Is the patient's musculature WNL? If not, describe area(s) and degree(s) of weakness. [If the facility does not have isokinetic testing capability, ask only for manual muscle testing.]

(iv) Evaluate the patient's complaint(s) of pain, including: where, to what degree, duration, and radiation, if any. Are pain symptoms increasing, decreasing, or static? Is the quality of any pain symptoms changed with medication, treatment modality, rest, or any other factor?

(v) From observation and palpation, is any muscle spasming noted? If so, where and to what degree, and is affected musculature painful to touch? Are there any other areas of tenderness, e.g. sacroiliac joint? If so, evaluate and explain.

(vi) Is the neurological examination WNL?[37] If not, describe abnormal findings. Is any sensory deficit noted? Does the patient claim to have paresthesias [altered sensation, e.g. "pins and needles"]? If so, where; what nerves are affected? Are deep tendon reflexes WNL? Describe.

(vii) [If claimant has low back pain] Does the patient display a positive straight leg raise or similar sign? If so, right, left or both, and at what degree of hip flexion? Are confirmatory tests positive?

(viii) Evaluate the patient's current ability to carry out activities of daily living. Conduct a relevant work capacity evaluation. Evaluate the patient's current degree of disability.

(ix) Evaluate the relationship, if any, of other systemic conditions, e.g. asthma, obesity, etc., to patient's current symptoms.

(x) Conduct psychological prescreening of the patient, e.g., McGill-Melzack Pain Assessment.[38] In your opinion, what degree of psychological component is there in the patient's complaints of pain? Indicate if further psychological testing would be appropriate.

(xi) Conduct any other appropriate tests and measurements required for a complete evaluation of this patient's status related to complaints of pain and other symptoms.[39]

(xii) Comment on prior medical treatment and testing, if applicable.

The questions presented to a medical examiner evaluating a claimant's disability must be individually tailored to the specific claimant. The claims attorney should go over the case with the examiner before the claimant's examination. The attorney should tell the examiner to do a psychological prescreen, comment on activities of daily living, rule out compensatory syndrome, document how a disability rating is calculated, etc. Claims attorneys should develop, in conjunction with the preexamination discussion, claimant-specific questions to augment the basic shell of questions.

While the examiner's report need not formally answer each question in deposition format, it should cover each point requested of the examiner by the claims attorney. After the examination, the claims attorney should follow up with the examiner, if necessary, to clarify or augment the written report, while the examiner's recollection of the claimant is still fresh.

Conclusion

A comprehensive and unbiased functional disability evaluation of a claimant is required to accurately assess damages in major musculoskeletal injury cases. Because the examination and accompanying report are likely to be more comprehensive in a multidisciplinary setting, claims attorneys should consider employing such a facility for independent medical evaluations and government-ordered claimant medical examinations, unless the cost of such an examination is relatively prohibitive. Claims attorneys should assist the consultant(s) in developing claimant-specific questions for the examination, and ensure that the examiner comments on prior evaluations and treatment, if applicable, and rules out compensatory syndrome. Armed with a comprehensive report of the functional evaluation of a claimant, the claims attorney is in the best position to accurately assess damages, relay questions to other medical experts working for the government or for the claimant, and effectively negotiate the settlement most equitable to both the claimant and the government.

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[33] One of the chief complaints of consultants asked to render an opinion on the degree of disability of a patient is that they must do so with incomplete information. *Role of Physicians in Disability Determination, supra* note 22, at 709.

[34] For illustrated ranges of motion charts of the limbs and spine, see Attorneys' Textbook, *supra* note 18, at 181-25—181-72.

[35] For an analysis of posture, see F. Kendall and E. McCreary, Muscles: Testing and Function 269–316 (3d ed. 1983).

[36] For excellent illustrations of limb, paraspinal and facial musculature, and their innervations, see Kendall and McCreary, *supra* note 35, at 31–267. For an explanation of the manual muscle test and a comparative chart of the different methods of grading muscle strength, see Kendall and McCreary, *supra* note 35, at 3–15.

[37] For an explanation of the neurologic examination, see J. Chusid, Correlative Neuroanatomy and Functional Neurology 403–12 (15th ed. 1973).

[38] For an analysis of the McGill-Melzack Pain Questionnaire, see Melzack, *The McGill Pain Questionnaire: Major Properties and Scoring Methods*, 1 Pain 277–99 (1975). For a general discussion of psychological pain assessment, see Melzack, R. and Wall, P., The Challenge of Pain 143–54; Gallon, Smukler and Kirton, *A Psychological Pain Assessment Index for Chronic Pain Patients*, 1 Pain Management (1987).

[39] Additional tests must not cause the total examination cost to exceed the approved cost ceiling. *See* AR 27–20, para. 2–16b.

Management Notes

Change in Claims Office Designations

Both the Letterkenny Army Depot and Fort Indiantown Gap Claims Offices have lost their designations as claims processing offices with approval authority. Their Area Claims Office SJA may designate them as claims processing offices without approval authority in accordance with paragraphs 1–7d(4) and 1–8c(1), AR 27–20.

Effective 1 December 1988, the claims office located at 528th USAAG, Cakmakli, Turkey was designated as a claims processing office with approval authority. Its office code is ES6 and it operates under the supervision of the USASETAF & 5th SUPCOM Area Claims Office. COL Lane.

Claims Manual Change 9

In late November 1988, USARCS mailed Change 9 to the Claims Manual to all Claims Manual holders of record. Change 9 contains the following items:

Chapter 1, Personnel Claims, Bulletins #78, 87, and 88 are revised. Bulletins #104 (Subrogated Claims Presented by Insurers and Other Third Parties) and #105 (Losses at the Workplace) are added.

Chapter 2, Household Goods Recovery, Bulletin #12 (Bankrupt Carriers Listing) is added.

Chapter 7, Claims Office Administration, Bulletins #4 (Stanfins) and #5 (Abbreviating Names of Insurers and Warehouse Firms/Contractors) are added.

Chapter 10, Automation/Information Management, Bulletin #3 (Converting Tort Claims) is added.

For a listing of all previous Manual changes, see the following *The Army Lawyer* editions: Aug. 1988, at 52 (change 8), Feb. 1988, at 67 (change 7), Oct. 1987, at 61 (change 6), Aug. 1987, at 67 (change 5), Jun. 1987, at 49 (change 1–4). LTC Wagner.

Affirmative Claims Note

CHAMPUS Fiscal Intermediaries

Ms. Roberta Herrich, Assistant General Counsel, OCHAMPUS, provided the following names and telephone numbers of the person at each CHAMPUS fiscal intermediary who is responsible for the development of third party liability claims:

Blue Cross and Blue Shield of South Carolina—Suzanne Williams, 803–665–6013

Wisconsin Physicians Service—Chuck Henderson, 608–221–4711, ext 632

Blue Cross of Washington and Alaska—Sandy Trevino, 206–670–5075

Hawaii Medical Service Assn.—Luukia Abbley, 808–944–2355

The Associated Group—Kathy Coonce, 812–379–5036

If any claims officer has problems acquiring information from the above sources, call Ms. Herrick at 303–361–8990. Mr. Robert Sheperd, Assistant General Counsel, OCHAMPUS, is also available to provide assistance. His number is 303–361–8506. MAJ Morgan.

Personnel, Plans, and Training Office Note

Personnel, Plans, and Training Office, OTJAG

The Acquisition Law Specialty Program

The Judge Advocate General established the Acquisition Law Specialty (ALS) Program in May 1985. The purpose of the ALS Program is to meet the growing need in the Army for acquisition law expertise. To help meet this need, the senior leadership of the Army directed that there be an appropriate mix of uniformed and civilian attorneys involved in acquisition law. The importance of The Judge Advocate General's Corps' commitment to meet this need should be understood by all judge advocates, whether or not they are acquisition law specialists.

The increasing scope and complexity of the acquisition process require specialization if judge advocates are to play a meaningful role in this area. When the ALS Program was established, it was recognized that such specialization would constitute a departure from the "generalist" approach to career development traditionally taken by most officers in The Judge Advocate General's Corps. Because the ALS Program is relatively new, its shape is still developing. This article provides a progress report on the ALS Program.

Overview

The ALS Program establishes a centrally managed system for identifying, training, and assigning lawyers so that The Judge Advocate General's Corps can develop and maintain its qualified personnel, both military and civilian, with the requisite breadth and depth of acquisition law expertise. The Personnel, Plans, and Training Office (PP&TO) administers the Acquisition Law Specialty Program, under the oversight of the Assistant Judge Advocate General for Civil Law. PP&TO coordinates with the Chief, Contract Law Division, Office of The Judge Advocate General, concerning the ALS Program.

The ALS Program consists of several elements: identification of attorneys who, by virtue of interest and experience, are acquisition law specialists; providing for career development of acquisition law specialists; and identification of positions that are appropriate for fill by acquisition law specialists.

Identifying Acquisition Law Specialists

Any interested judge advocate may apply for admission to the ALS Program. Judge advocates must have career status (including Conditional Voluntary Indefinite (CVI)), at least two years of Judge Advocate General's Corps experience, and be competitive for promotion. Experience in acquisition law is not a prerequisite to enrollment in the program. Enrollment is subject to the approval of The Judge Advocate General, upon recommendation of the Chief, Personnel, Plans, and Training Office, and the Assistant Judge Advocate General for Civil Law. Interested judge advocates should apply by submitting a request for enrollment through their staff judge advocate or other supervisor.

Judge advocates enrolled in the ALS Program will be entered in the Personnel, Plans, and Training Office data base as acquisition law specialists. Beginning in calendar year 1989, the remarks section of the Officer Record Brief (ORB) will be annotated to indicate enrollment in the ALS Program.

Career Development

Assigning Acquisition Law Specialists

Judge advocates enrolled in the ALS Program receive first consideration for assignment to acquisition law positions, as well as for acquisition law training. Acquisition law specialists will normally be given consecutive assignments to acquisition law or related positions. Enrollment in the ALS Program, however, does not preclude assignment to other positions.

As indicated above, enrollment in the ALS Program does not, of itself, reflect any particular degree of acquisition law expertise; rather, it constitutes a statement of interest, and entitles one to first consideration for acquisition law assignment and training opportunities. Judge advocates with the requisite acquisition law experience will be awarded the Skill Identifier 3D. The Officer Record Brief (ORB) will be annotated to reflect this. The Skill Identifier is an additional tool used by PP&TO to identify those who may have the experience and training called for for certain positions. As is the case with all judge advocates, assignments will be made to meet the needs of the Corps, with due consideration for individual preferences and professional development.

Training for Acquisition Law Specialists

Since 1985 acquisition law training opportunities have been expanded. The Judge Advocate General's School has added four acquisition related courses to its curriculum: the Advanced Acquisition Course, Procurement Fraud Advisors Course, Program Managers' Attorneys Course, and Advanced Installation Contracting Course. An additional instructor has been assigned to the Contract Law Division at The Judge Advocate General's School to meet the increased training requirements. Other training opportunities have also been expanded. The Judge Advocate General's Corps has obtained one quota for each offering of the Program Managers Course at the Defense Systems Management College at Fort Belvoir, Virginia. This comprehensive four month course is offered two to three times annually. Acquisition law specialists interested in attending this course should apply by writing to PP&TO. The Judge Advocate General's Corps continues to send at least one judge advocate annually for a Master of Law degree in government procurement law at a civilian school. Efforts are underway to obtain funding to expand this program.

The Army Materiel Command Intern Program continues. Under this program ten judge advocates are assigned to the legal offices of various commands within the Army Materiel Command. These judge advocates receive extensive training at The Judge Advocate General's School, the Army Logistics Management Center at Fort Lee, and elsewhere, as well as valuable "hands-on" experience during their three year tour as interns. Judge advocates ordinarily must have either Voluntary Indefinite (VI) or Regular Army (RA) status to be selected for this program. Interested judge advocates should contact PP&TO. A service obligation attaches to this program.

Finally, the Acquisition Law Assistance Program has been established in the Contract Law Division, Office of The Judge Advocate General. This program is designed to provide technical advice and assistance to attorneys in the field across the spectrum of acquisition law issues.

Promotions and Schools

Judge advocates enrolled in the ALS Program remain eligible for Intermediate Service School (i.e., Command and General Staff College and the Armed Forces Staff College) and Senior Service College (e.g., Army War College, ICAF). Acquisition Law Specialists will have an equal opportunity with other judge advocates for promotion and for other than acquisition law training programs. All judge advocates, including those enrolled in the ALS Program, who are in a given zone of eligibility, are considered together for promotion and service school opportunities. There are no quotas, and no floors or ceilings, for any group or category of judge advocates. Selection boards do receive a specific instruction on the need for acquisition law (and other) specialists in The Judge Advocate General's Corps, and on the nature of their work and career patterns. An equal chance for promotion is a key element in ensuring success for the ALS Program.

Some judge advocates enrolled in the ALS Program have expressed concern, because they are rated by civilians who may not be as familiar with the Officer Evaluation Report system as are Army officers. Boards also receive an instruction on this subject. Officers and their civilian raters should be aware that technical advice and assistance in preparing Officer Evaluation Reports is available. In the Army Materiel Command, the senior judge advocate in the Office of the Command Counsel, Headquarters, U.S. Army Materiel Command, is available to provide such assistance. The Total Army Personnel Agency (TAPA) has published guidance on Officer Evaluation Report preparation. Finally, PP&TO is available to provide information or assistance.

ALS Positions

The Personnel, Plans, and Training Office has developed a list of ALS positions. The list includes positions at the installation level, at Major Command headquarters, at the Headquarters, Department of the Army and Field Operating Agency level, and at various levels in the Army Materiel Command. In May 1988 The Judge Advocate General, the General Counsel of Department of the Army, and the Chief Counsel of the Army Materiel Command signed a Memorandum of Agreement which modified the 1984 Memorandum of Understanding and expanded the number of judge advocate positions within the Army Materiel Command. This agreement ensures that judge advocates will play a meaningful role at action attorney and supervisory levels.

The current list of ALS military positions is provided below. It should also be recognized that not all positions identified as appropriate for an acquisition law specialist are currently filled by judge advocates enrolled in the ALS Program. As of October 1988 there were 101 judge advocates enrolled in the program. Even as this enrollment expands, as is expected, it may be that not all the positions on the list will always be filled by an acquisition law specialist. That will be a goal, however, and PP&TO will look first to those enrolled in the program to fill these positions.

This list of positions will be reviewed at least annually by PP&TO. Staff judge advocates and other supervisors should suggest appropriate additions or modifications by contacting PP&TO. The number of positions in each of the field grades form a pyramid structure appropriate for career development, recognizing that not all ALS judge advocates will always be in ALS positions.

Conclusion

The ALS Program is now a key component of the Judge Advocate Legal Service. Recent headlines leave no doubt that the Army and The Judge Advocate General's Corps will need to devote considerable talent and resources to the acquisition process. The initial success of the ALS Program helps ensure that The Judge Advocate General's Corps will fill this need.

ALS Military Positions

Colonel Positions (16)
Chief, Contract Law, OTJAG
Chief, Contract Appeals
Office of General Counsel, DA
Chief Counsel/SJA, Strategic Defense Command—Huntsville
Chief Counsel/SJA, TECOM–APG
Chief Counsel/SJA, AVSCOM
Chief Counsel, LABCOM
Dep. Chief Counsel, MICOM
Dep. Chief Counsel, AMCCOM-Rock Is.
Dep. Chief Counsel, TACOM
Chief Counsel, AMCCOM—Dover
Chief Counsel, AAFES (alternate with Air Force)
SJA, Military Traffic Management Cmd
SJA, Information Systems Command
Chief Counsel, US Army Contracting Command, Europe
Chief, Procurement Fraud Division

Lieutenant Colonel Positions (30)
Contract Law Division, OTJAG (2)
Acquisition Law Assistance Program
Contract Appeals Division (2)
Office of General Counsel, DA
Headquarters Services, Washington
Medical Research and Development Cmd
US Army Contracting Command, Europe—Frankfurt
Contract Law Division, OJA, USAREUR
SJA, Fort Ritchie
Information Systems Selection and Acquisition Activity
Headquarters, US Special Operations Command
Headquarters, FORSCOM
Headquarters, TRADOC
Contract Law Division, TJAGSA
AAFES Munich
Procurement Fraud Division (2)
Technology Contracts Management Office, VHFS
SJA, White Sands Missile Range
HQ, Army Materiel Command (2)
CECOM—Branch Chief (2)
MICOM—PM Counsel
MICOM (2)
AVSCOM—Branch Chief
Army Logistics Management College

Major Positions (43)
Contract Law Division, OTJAG
Contract Appeals Division (7)
Acquisition Law Assistance Program (2)
ASBCA (4)
Office of General Counsel
Contract Law Division, TJAGSA (3)
Mobilization Systems Planning Agency
Army Logistics Management College
Contract Law Division, OJA, USAREUR
FORSCOM, OSJA
III Corps, OSJA
Information Systems Selection Activity
AAFES Pacific
Procurement Fraud Division
Strategic Defense Command—Huntsville
Kwajalein Missile Range
Corps of Engineers—Mobile
AVSCOM—Procurement Law (2)
CECOM—Procurement Law (2)
BRDEC
DESCOM
MICOM—Procurement Law
MICOM—Adversary Proceedings
MICOM—Acquisition Law (2)
TACOM—Procurement Law
TECOM—Procurement Law
TROSCOM—Tooele

Captain Positions (45)
Contract Appeals Division (11)
Contract Law Division, TJAGSA
Army Logistics Management College (3)
US Army Contracting Command, Europe—Furth—Stuttgart
Contract Law Division, OJA, USAREUR (3)
Contracting Agency, Korea
Headquarters Services, Washington
Medical Research & Development
Corps of Engineers—Mobile
Corps of Engineers—Fort Worth
Recruiting Command
MTMC—HQ
MTMC—Oakland
MTMC—Bayonne
TRADOC—Eustis
3d Army
AVSCOM
DESCOM—Corpus Christi
White Sands Missile Range
MICOM

CECOM Interns (2)
TACOM Interns (2)
AMCCOM—Rock Island Interns (2)

MICOM Interns (2)
AVSCOM Intern
BRDC Intern

Criminal Law Notes

Criminal Law Division, OTJAG

Pretrial Agreements—Two Potential Problem Areas

Historically, the American justice system has been divided on the utility of pretrial agreements in criminal trials. Notwithstanding the fact that pretrial agreements were not specifically mentioned in either the Uniform Code of Military Justice or the Manual for Courts-Martial until the 1984 Manual, they have long been sanctioned in Army courts-martial. With the frequent use of pretrial agreements, trial counsel, defense counsel, staff judge advocates, and military judges must be familiar with the law regarding such agreements. In hopes of increasing the awareness of military criminal law practitioners, this note will overview two potential problem areas in the use of pretrial agreements: 1) the "nondivisible" operation of the sentence portion of the agreement upon the adjudged sentence, and 2) the inclusion of a pretrial agreement provision that requires that the accused elect trial by military judge alone.

The Unitary Nature of the Pretrial Agreement

Pretrial agreements commonly contain an appendix wherein the convening authority agrees not to approve a sentence in excess of that stated in the appendix. A typical sentence appendix might read: "The Convening Authority agrees not to approve any sentence in excess of (1) reduction to E1; (2) forfeiture of two-thirds pay per month for four months; (3) confinement for four months; and (4) a bad conduct discharge." The problem with this provision occurs when the court sentences the accused to be reduced to E1 and to be confined for five months. As written, the language in the sentence appendix may be construed in either of two ways: 1) as imposing a limit on each element or divisible portion of the sentence, or 2) as imposing a limit only on the severity of the sentence taken as a whole. Of course, the overriding consideration is the understanding of the parties. More often than not, the parties to the trial are under the assumption that the sentence appendix imposes a limit on each separate portion of the adjudged sentence; therefore, in the above example, the convening authority could approve the reduction and only four months confinement. Applicable military case law, however, holds that the pretrial agreement imposes a limitation only on the overall severity of the sentence.[1] Thus, in the above example, because the sentence adjudged, when taken as a whole, is less severe than the sentence limitation in the pretrial agreement (confinement for five months is less severe than four months of confinement and a bad conduct discharge), the convening authority may approve the reduction and the confinement for five months.

Another example of the "unitary" nature of court-martial sentences exists in *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983), wherein the pretrial agreement provided that the convening authority would not approve a sentence in excess of confinement for four months, forfeiture of two-thirds pay per month for four months, reduction to E1, and a bad conduct discharge. The sentence of the court was confinement for two months, forfeiture of two-thirds pay per month for six months, reduction to E1, and a bad conduct discharge. Because the adjudged sentence taken as a whole was less severe than that contained in the agreement (forfeitures are less severe than confinement), the adjudged sentence was not affected by the pretrial agreement.

When considering the effect of the sentence appendix upon the adjudged sentence, all parties to the trial should be aware that unless the parties manifest a contrary intent within the agreement or at trial, the sentence of the court will be treated as being unitary, not divisible.[2] This is one area of the law in which counsel, judges, and staff judge advocates must be knowledgeable so that the approved sentence is one that represents the understanding of the parties. A meeting of the minds on this issue at the trial level will also avoid needless issues on appeal.

The Forum Selection Clause

In recent times, pretrial agreement terms have become more innovative and contain more than mere limitations on the sentence. One provision that began appearing before the adoption of Rule for Courts-Martial (R.C.M.) 705, which addresses pretrial agreements, was that the accused would elect trial by military judge alone. The appellate courts approached these provisions with caution, but upheld them if the idea originated with the defense and was offered as an incentive for the government to negotiate.[3] R.C.M. 705 now expressly permits the accused to offer to waive trial by court-martial composed of members. R.C.M. 705 further mandates that a pretrial agreement term is unenforceable if the accused did not freely and voluntarily agree to it.

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[1] United States v. Brice, 38 C.M.R. 134 (C.M.A. 1967); United States v. Monnett, 36 C.M.R. 335 (C.M.A. 1966).

[2] Dep't of Army, Pam. 27-173, Legal Services: Trial Procedure, para. 11-2c (15 Feb. 1987); *but see* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-17 (1 May 1982) (C1, 15 Feb. 1985) (". . . you will have the benefit of whichever is less, each element of the sentence of the court or the pretrial agreement.") (Unless a contrary intent is made known at trial, to avoid interpreting the judge's advice as making the operation of the pretrial agreement divisible as to each element of the sentence, the advice should more appropriately be: "You will have the benefit of whichever is less when considered in its entirety, the sentence of the court or that contained in the pretrial agreement.")

[3] *See, e.g.*, United States v. Schmeltz, 1 M.J. 8 (C.M.A. 1975), *rev'd on other grounds*, 1 M.J. 273 (C.M.A. 1976); United States v. Martin, 4 M.J. 852 (A.C.M.R. 1978).

Recent appellate decisions continue to closely scrutinize such provisions.[4] The Army Court of Military Review has made three observations about a provision wherein the accused waives the right to a trial by court members: 1) the court does not condone such provisions; 2) military judges have a duty to "closely scrutinize" the provision during the providence inquiry to determine if any service or local command policy exists that undermines Congress's intent to provide an accused the option of being tried by members; and 3) the court has serious reservations about whether an accused enjoys a viable trial forum option if the defense counsel advises the accused to waive the forum option prior to the prearraignment article 39(a) session without gaining a tangible benefit.[5]

Staff judge advocates, trial counsel, and military judges must be alert to ensure that any offer to waive trial by members originates with the defense and does not become a matter of command policy as part of the *quid pro quo* of the pretrial agreement. In a recent Air Force case, the military judge failed to inquire whether the offer to waive trial by members originated with the accused; however, because the military judge obtained the accused's agreement with the pretrial agreement provision that "[t]his offer originated with me and my counsel, and no one has attempted to force me to make this offer or to plead guilty" and, because the accused also made the statement that he would have requested trial by military judge alone even without the pretrial agreement, the Air Force appellate court affirmed the findings and sentence.[6] While the inclusion of a specific term stating that the provision originated with the accused would be beneficial to serve as a safeguard, military judges are encouraged "to pose specific questions concerning any provision of a pretrial agreement which purports to waive defense rights at trial."[7]

The Joint Service Committee on Military Justice has recently referred to its Working Group a proposal to amend R.C.M. 705, which would allow the prosecution to initiate offers and terms of pretrial agreements. The proposed amendments would bring the military pretrial agreement practice more in line with that contained in the Federal Rules of Criminal Procedure. Even with the amendment, however, military appellate courts are unlikely to fully and freely accept a provision requiring the waiver of trial by members. As recently stated by the United States Court of Military Appeals, "[o]ur reluctance . . . is not chimerical . . . [i]t is grounded instead on Congress' decision to provide the military accused a viable option to be tried by members or by military judge alone."[8] Until Congress makes legislative changes permitting waiver of trial forum rights in a pretrial agreement, military appellate courts will continue to closely scrutinize provisions that require the accused be tried by military judge alone.

Conclusion

Judge advocates should become knowledgeable of the existing law regarding the use of pretrial agreements in the military. The accused must not only freely and voluntarily enter into each term of the agreement, but must have a clear understanding of each term and knowingly appreciate the effect of the pretrial agreement. Only when all parties are knowledgeable of the pretrial agreement's terms and the underlying law will the record of trial be protected and needless appellate issues be avoided. MAJ Gary J. Holland.

Observations on Urinalysis

Since 1984 the Office of The Judge Advocate General has been responsible for conducting the legal portion of the quarterly quality assurance inspections of Army and Army contract forensic drug testing laboratories. The purpose of the inspections is to ensure that the intralaboratory chain of custody procedures and documents are legally supportable. These three-day inspections typically consist of an inbriefing by the laboratory officer-in-charge (or director), a tour of the laboratory, an in-depth review of chain of custody paperwork and testing data, an observation of laboratory personnel performing their assigned duties, a review of the laboratory's standard operating procedures (SOP) to ensure compliance with The Surgeon General's SOP for the handling and testing of urine samples, and an outbriefing with the laboratory's command (or management group). These inspections have reflected that the drug testing laboratories used by the Army have done an admirable job of properly handling, safeguarding, and documenting chains of custody for urine specimens ever since the incorporation of stringent intralaboratory chain of custody procedures in 1983.

While the drug testing laboratories are nearly error free in the handling of urine samples, laboratory inspectors notice repeated and numerous unit/installation errors on the urinalysis chain of custody form, DA Form 5180–R. Pursuant to guidance contained within The Surgeon General's SOP concerning unit/installation errors, the laboratories are presently discarding without testing four to eight percent of all specimens that arrive at the laboratories. Four to eight percent does not sound like much, but when one considers that in fiscal year (FY) 1988 the laboratories tested 893,292 specimens, the percentage equates to discarding without testing about 70,000 specimens due to discrepancies. (With the FY 1988 positive rates of 1.77 percent for marijuana and 0.86 percent for cocaine, this means that potentially 1,848 drug abusers were not identified.)

The Surgeon General's SOP mandates that if any of the following discrepancies are noted by laboratory personnel, the Army specimen associated with the discrepancy will be discarded without further processing: 1) box of specimens received with no seal or seal broken; 2) incomplete social security number (SSN) on DA Form 5180–R or specimen bottle; 3) SSN on specimen bottle and DA Form 5180–R do not match; 4) illegible SSN on DA Form 5180–R or specimen bottle; 5) incomplete unit specimen number (less than 13 digits) on DA Form 5180–R or specimen bottle; 6) unit specimen number on specimen bottle and DA Form 5180–R do not match; 7) illegible unit specimen number on DA Form 5180–R or specimen bottle; 8) the unit specimen number duplicates another unit specimen number; 9) no

[4] *See, e.g.*, United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987); United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987).

[5] 24 M.J. at 710.

[6] United States v. Reed, 26 M.J. 891 (A.F.C.M.R. 1988).

[7] 26 M.J. at 894.

[8] 24 M.J. at 2.

DA Form 5180–R is received with the box of specimens; 10) DA Form 5180–R received separately from specimens; 11) no chain of custody entries on DA Form 5180–R; 11) DA Form 5180–R is missing requested data other than the SSN and unit specimen number; 12) specimen bottle contains less than 60ml of urine; 13) although specimen is listed on DA Form 5180–R, no specimen was received; 14) specimen appears adulterated (in several situations, water, apple juice, or Listerine mouthwash was submitted as a specimen, which indicates that the observer or other personnel involved in the chain of custody were derelict in the performance of their duties); 15) specimen container is not authorized type; 16) specimen contains unknown substance that interferes with testing; 17) a laboratory accident occurs that prevents further testing; and 18) the specimen leaked in shipment.

Personnel at the drug testing laboratories appear to be extremely diligent in fulfilling their responsibility under the SOP. Unit compliance with the instructions contained in Appendix E, AR 600–85 and on the DA Form 5180–R would eliminate many of the unit errors being noticed by personnel at the drug testing laboratories. One instruction in Appendix E, AR 600–85, requires that the Installation Biochemical Testing Coordinator (IBTC) or a designated representative review each DA Form 5180–R and specimen bottle for completeness and accuracy. In a recent memorandum to MACOM staff judge advocates, the Assistant Judge Advocate General for Military Law requested that staff judge advocate offices become more involved in overseeing unit/installation urinalysis procedures and documentation to ensure compliance with applicable regulatory and forensic standards. In this regard, judge advocates should be familiar not only with the above discrepancy criteria, but also with the common errors being made that do not negate the testing of the specimen, but which may create sufficient problems to preclude adverse actions based on a positive urinalysis.

In addition to the discrepancies that result in the laboratory discarding the specimen, the following errors are common occurrences by unit/installation personnel: 1) entries on chain of custody forms are illegible (the DA Form 5180–R becomes a forensic document, *i.e.*, capable of being used as evidence in a court of law—as such, it needs to be legible.); 2) reproductions of DA Form 5180–R used as original forms are so poorly photocopied that some entries are indiscernible; 3) specimens are being kept overnight (or for several days) without any annotation as to where they are stored (to accurately reflect the chain of custody, the storage of specimens should be annotated and separate entries should be made for placing specimens into temporary storage and removing them from temporary storage); 4) units are holding specimens for more than 24 hours before giving them to the IBTC (this violates paragraph E–9, AR 600–85); 5) personnel are using "white-out" and making other unauthorized corrections to the DA Form 5180–R (AR 600–85 authorizes only two types of corrections: a line-through correction with the correct entry, initials and date being placed next to the mistaken entry (paragraph E–3); and a certificate of correction (paragraph E–17c.); 6) units are using file labels for sealing the top of specimen bottles (the labels obscure identifying data on the specimen bottle label—if a seal on the bottle is used, tamper-proof evidence tape should be used, not an improvised seal); 7) units are failing to indicate on the DA Form 5180–R how the specimens were sent to the laboratory (appropriate entries on the chain of custody should read: in the "Received by" block, "Postal service;" in the "Purpose of Change/Remarks" block, "Sent to lab, seal intact" or "Sealed and sent to lab." If registered mail or certified mail is used, then the registered or certified mail number should also be listed in the "received by" block. If an express courier service is used, the name of the service, *e.g.*, Federal Express, should be placed in the "Received by" block instead of "postal service."); 8) some units are using stamps on chain of custody forms that are so large that they obliterate other entries (if stamped entries are used, they should fit within the corresponding block on the form); and 9) units are using red ink for their stamped entries which makes it difficult to produce a good photocopy of the form (all entries should be made in black ink).

The military urinalysis program has progressed a long way. In fact, the military's program and its drug testing laboratories now are recognized as models for the private sector. The Army cannot afford to have the credibility of the overall drug testing program diminished by correctable problems at the installation level. To prevent this from occurring, the U.S. Army Drug and Alcohol Operations Activity is in the beginning stages of initiating a contract that will require the contractor to conduct inspections of installation biochemical testing operations. Until the contract comes into existence (and even thereafter), staff judge advocate offices should closely scrutinize the actions of installation drug testing procedures and operations. MAJ Gary J. Holland.

Hirshberg Still Good Law

A recent TJAGSA Practice Note[9] correctly indicates that discharge certificates that are erroneously delivered or fraudulently obtained will not terminate amenability to court-martial jurisdiction for offenses committed during the period of duty immediately preceding such "discharge." An issue not discussed, however, was the continued vitality of the *Hirshberg* rule and the effect of an actual interruption in military service or status.

The amendment to article 3(d), UCMJ, enacted in The Military Justice Amendments of 1986,[10] was intended to bridge the jurisdictional gap identified in *United States v. Caputo*,[11] wherein the court held that jurisdiction over offenses committed by a reservist during a period of duty was permanently lost in the absence of some affirmative action to preserve jurisdiction taken during the period of duty. Congress was concerned that

> [b]ecause reservists normally serve only for period of a few hours or days at a time, offenses are often not discovered until after the end of the duty period. Even if an offense were discovered during a drill period, the action necessary to preserve jurisdiction may not be possible prior to the end of the drill. To have a reservist's accountability for an offense to turn on

[9] Note, *Discharges Aren't What They Used to Be*, The Army Lawyer, Aug. 1988, at 45.

[10] National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99–661, Title VIII, § 804, 100 Stat. 3095 (1986).

[11] 18 M.J. 259 (C.M.A. 1984).

circumstances so fortuitous would detract from discipline and morale in reserve-component units.[12]

This amendment was intended to impact upon reserve component members, not regular component members. Thus, when the President implemented this amendment in the Manual for Courts-Martial, a new Rule for Courts-Martial 204 was created entitled "Jurisdiction over certain reserve component personnel."[13] R.C.M. 204(d), "Changes in type of service," provides in part:

> A member of a reserve component at the time disciplinary action is initiated, who is alleged to have committed an offense while on active duty or inactive duty training, is subject to court-martial jurisdiction without regard to any change between active and reserve service or within different categories of reserve service subsequent to commission of the offense.[14]

This Rule furthered the congressional intent that each severable component of a reservist's term of the enlistment (i.e., active duty training, inactive-duty training, active duty or inactive duty) is not a disjunctive period of court-martial jurisdiction.

Congress was quite clear, however, that the amendment to article 3, UCMJ, was not intended to affect the law concerning the impact of a valid discharge on court-martial jurisdiction, when it stated: "With respect to the proposed amendment of Article 3, the committee intends not to disturb the jurisprudence of *United States ex rel. Hirshberg v. Cooke*, 366 U.S. 210 (1949)."[15]

In 1942 Hirshberg, who was an enlisted sailor serving a second enlistment, became a prisoner of war of Japan when the United States forces on Corregidor surrendered. After his liberation in September 1945, Hirshberg was returned to the United States and hospitalized, and upon release from the hospital in January 1946, was restored to duty. On March 26, 1946, Hirshberg was granted an honorable discharge because of the expiration of his prior enlistment, and the next day he reenlisted for a four year term. In 1947 Hirshberg was served with charges alleging that, during his prior enlistment, he had maltreated two other naval enlisted men who were Japanese prisoners of war working under his direction. On February 28, 1949, the Supreme Court overturned Hirshberg's court-martial conviction, holding that there was no court-martial jurisdiction to try an enlisted sailor for an offense committed during a prior enlistment terminated by an honorable discharge, even though he reenlisted on the day following his discharge.[16]

In the initial drafting of the UCMJ Congress did not specifically address the *Hirshberg* jurisdictional gap,[17] but drafted a proposed article 3(a) that would extend jurisdiction over reservists who committed offenses while subject to military jurisdiction, even when the reservist had left such status.[18] On March 18, 1949, less than three weeks after the *Hirshberg* decision, Congress initiated an attempt to overrule *Hirshberg*.[19] Noting that the Supreme Court "held as they did solely because we did not have a provision in the law that provided for continuing jurisdiction."[20] The subcommittee believed that it could:

> put a provision in here, that would be perfectly constitutional, that it should be fixed as of the time the crime is committed and the mere fact that he is discharged at a latter date and returns to civilian life ought not to free him from being prosecuted in a military court for an offense that he committed while he was in the service.[21]

Although *Hirshberg* was decided on traditional military law grounds, the subcommittee anticipated constitutional limitations and provided that the exercise of this jurisdiction would be contingent on no American civil court having jurisdiction.[22] The subcommittee was also concerned about the potential for abuse and decided to limit the types of offenses subject to this jurisdiction to those that were

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[12] H.R. Rep. No. 718, 99th Cong., 2d Sess. § 227 (1986).

[13] Exec. Order 12586, 52 Fed. Reg. 7103 (1987); Manual for Courts-Martial, United States, 1984 (C3, 1 June 1987) [hereinafter MCM, 1984].

[14] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 204(d) [hereinafter R.C.M. 204(d)].

[15] *H.R. Rep. No. 718, supra* note 4, at 227.

[16] United States ex rel. Hirshberg v. Cooke, 336 U.S. 210, 211–219 (1949).

[17] *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 881 (1949) [hereinafter *Hearings*], wherein Mr. Larkin noted that "we did not provide for the Hirshberg type of case in this code, because frankly it was before the Supreme Court and we just did not know what was going to happen."

[18] *Hearings* at 879:

> Reserve personnel of the armed forces who are charged with having committed, while in a status in which they are subject to this Code, any offense against this Code, may be retained in such status or, whether or not such status has terminated, placed in an active duty status for disciplinary action, without their consent, but not for a longer period of time then may be required for such action.

[19] *Hearings* at 879–84.

[20] *Hearings* at 881 (Statement of Mr. Larkin). In *Hirshberg*, the absence of any express congressional authorization to try a service member such as Hirshberg, who is presently in the service for an offense committed in a prior enlistment period from which he has been discharged, was contrasted with an 1863 congressional authorization [12 Stat. 696 (1863)] for courts-martial to punish frauds against the military branches of the Government in connection with procurement of supplies for war activities (*Hirshberg*, 336 U.S. at 214–15). The Court noted that

> Congress in this 1863 Act plainly recognized that there was a significant difference between court-martial power to try men in the service and to try former servicemen after their discharge. . . . But the fact remains that the 1863 Congress did act on the implicit assumption that without a grant of congressional authority military courts were without power to try discharged or dismissed soldiers for any offense committed while in the service. . . . Since the 1863 Act, Congress has not passed any measure that directly expanded court-martial powers over discharged servicemen, whether they reenlist or not.

Id. at 215–16.

[21] *Hearings* at 882 (Statement of Mr. DeGraffenfried).

[22] *Hearings* at 883 (Statement of Mr. Smart: "court-martial could only try those cases . . . which were not triable in the civil courts.") (Statement of Mr. Elston: "we will say he was in United States and a certain State had the jurisdiction to try the case, they could not try him in the military courts?"; Statement of Mr. Smart: "Try everything in the civil courts you can if the accused is not on active duty. . . .").

punishable by confinement for five years or more.[23] The subcommittee believed that they had closed the *Hirshberg* loophole when the amended article 3(a) was approved as follows:

> Subject to the provisions of article 43, any person charged with having committed an offense against this code punishable by confinement for 5 years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia while in a status in which he was subject to this code, shall not be relieved from amenability to trial by court-martial by reason of the termination of such status.[24]

The congressional concern about the constitutionality of article 3(a) was realized in *Toth v. Quarles*,[25] wherein the Air Force had recalled a discharged airman, who had severed all ties to the military, and tried him in a court-martial for a murder he committed in Korea while he was in a military status. The Court held that the Constitution precludes court-martial of former service members who have served all ties with the military, even though the offense was committed while that person was subject to military jurisdiction.[26] Thus, a discharge from all further military service terminates military status and any further amenability to court-martial to court-martial jurisdiction.

If a service member receives a discharge with a break in military status of any duration and latter reenlists, then the service member is amenable to court-martial jurisdiction during the latter enlistment for an offense committed during the former enlistment only if the offense provides for at least five years confinement and is not triable in American civil courts. Since the service member has military status both at the time of the offense and at the time of trial, he or she is amenable to *in personam* jurisdiction and the proscription of *Toth v. Quarles* is not violated.[27] Additionally, if a service member is discharged in advance of his or her normal discharge date, solely for the purpose of reenlistment for another term of service with no interruption of military status, he or she may be tried by court-martial for offenses committed during the prior enlistment, regardless of the other requirements (article 3(a) five years confinement and nonavailability of American civil courts).[28] Both these situations are, of course, still subject to the statute of limitations.

The congressional intent, that the Military Justice Amendments of 1986 amendment to article 3 was not intended to disturb *Hirshberg*, was reflected in the last sentence to R.C.M. 204(d) that "[t]his subsection does not apply to a person whose military status was completely terminated after commission of an offense."[29] The Discussion language accompanying R.C.M. 204(d) that a "member of a regular or reserve component remains subject to court-martial jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service" must be read in light of the clear congressional intent regarding *Hirshberg*. The 1986 article 3 amendment was directed at reserve component personnel and was primarily intended to maintain jurisdiction within the limits of an enlisted term, regardless of changes from active duty to inactive duty or vice versa.

Every person who becomes a member of an armed force incurs an initial service obligation of not less than six years and not more than eight years, and any part of the service obligation that is not served on active duty or active duty for training shall be served in a reserve component.[30] Upon completion of any active duty obligation, the service member is not discharged, but is transferred to a reserve component to serve the remainder of his or her service obligation.[31] Such a service member receives a DD Form 214 that releases him or her from active duty, details a factual record of his or her service, and characterizes the nature of that service.[32] Because such a service member does not receive a discharge certificate until the completion of the entire service obligation, such transfers to the reserve component do not terminate court-martial jurisdiction. A regular component service member who receives a discharge and immediately accepts a reserve component enlistment is subject to court-martial for pre-discharge offenses only if the discharge was in advance of the normal discharge date and was for the purpose of accepting the reserve commitment,[33] or the provisions of article 3(a) are applicable. So long as *Hirshberg* remains good law, any change in military status involving a discharge must be closely examined to determined if court-martial jurisdiction still exists for pre-discharge offenses.

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[23] *Hearings* at 883–84; *see also* S. Rep. No. 486, 81st Cong., 1st Sess. 8 (1949):
[I]t is desirable to place some limitations on continuing jurisdiction over persons who commit offenses while subject to military law and who terminate their military status before apprehension. In the opinion of the committee, the present provisions of this subdivision provide a desirable degree of continuing jurisdiction and at the same time place sufficient limitations on the continuing jurisdiction to prevent capricious actions on the part of military authorities.

[24] *Hearings* at 1262.

[25] 350 U.S. 11 (1955).

[26] *Id.* at 13–23.

[27] *See* United States v. Ginyard, 37 C.M.R. 132 (C.M.A. 1967).

[28] *See* United States v. Clardy, 13 M.J. 308 (C.M.A. 1982).

[29] *See* R.C.M. analysis at A21–13.

[30] 10 U.S.C. § 651(a) (1982).

[31] 10 U.S.C. § 651(b) (1982).

[32] Army Reg. 635–200, Enlisted Personnel, chapters 3 and 4 (5 July 1984) [hereinafter AR 635–200]; *see also* 10 U.S.C. § 1168 (1982).

[33] *See e.g.* AR 635–200, para. 4–2j:
A soldier who, at the time of entry on active duty held an appointment as a USAR commissioned or warrant officer, or who while on active duty accepts appointment and such appointment is still current, will not be transferred to the USAR in his or her enlisted status. The soldier will be discharged. Orders discharging the soldier will be prepared per AR 631–10. The orders will indicate that the soldier is transferred to the USAR in his or her commissioned or warrant grade. Discharge to enter another military status does not terminate the soldier's military service obligation incurred under 10 U.S.C. 651a.

Labor and Civilian Personnel Law Notes

Labor and Civilian Personnel Law Office, OTJAG
and Administrative and Civil Law Division, TJAGSA

No Personal Liability for Personnel Actions

Upon remand from the Supreme Court, the Eighth Circuit, in *McIntosh v. Turner*, ___ F.2d ___, WL 122274 (8th Cir. 1988), reconsidered and set aside a $100,005 judgment against a manager for improper promotion practices. The new decision vacates the 1987 opinion in *McIntosh v. Weinberger*, 810 F.2d 1411 (8th Cir. 1987), which held that *Bush v. Lucas*, 462 U.S. 367 (1983), did not bar constitutional tort suits by federal employees against their supervisors when the civil service regulations did not provide complete relief. The court followed *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988), which held that when Congress has "heavily regulated" an area, constitutional tort remedies cannot be implied. The holding in *McIntosh* makes it very unlikely that there will be future constitutional tort claims for personnel actions.

Hatch Act Developments

Minnesota Dept. of Jobs and Training v. MSPB, 858 F.2d 433 (8th Cir. 1988), sustains the removal of a state employee who had ignored an Office of Special Counsel (OSC) warning about the invalidity of a district court decision on which the employee had previously relied (the court had held the Act inapplicable to state employees on leave). As indicated by the 8th Circuit's deference to the MSPB's interpretation of the Hatch Act and their repudiation of the district court opinion, the MSPB is the primary authority in Hatch Act cases.

AR 215–3 extends Hatch Act coverage to NAF employees. Because AR 215–3 is not clear concerning who should act on a violation or what the penalty should be, attorneys should consult with the Labor and Civilian Personnel Law Office when they are informed of a NAF violation. Other Hatch Act violations should also be reported to the Labor and Civilian Personnel Law Office to avoid premature reports to OSC.

Court Suggests Off-Duty Conduct Lacks Nexus

A demotion of an IRS supervisor for kissing women employees was reversed in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). The court held that the charges, which were based on the supervisor's conduct at a party held by trainees and instructors at a hotel, were unsupported. More significantly, the court stated in dicta that "what happened . . . was a private matter . . . and had nothing to do with . . . the agency's mission of collecting taxes, and was not a matter of official concern to the agency."

The court also dismissed a false statement charge that was based on the employee's denial of one of the other charges. Likening the denial to a plea of not guilty, the court observes that the "effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true." Dismissal is compelled "[o]therwise a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge."

This case should not be viewed as an absolute bar to litigating all off-duty incidents, nor should it discourage the disciplining of employees for making false statements.

Accommodation of Alcoholics

Faber v. Department of the Army, 38 M.S.P.R. 315 (1988) reverses the removal for AWOL of an alcoholic employee who spent nine months in jail for DUI. Although the Army accommodated him by enrolling him ADAPCP, the Army failed to accommodate his additional handicap of manic depression. Because alcoholic employees frequently suffer additional disabilities, labor counselors should be alert to other diagnoses that may raise issues about adequacy of accommodation in future litigation.

Beware of *Weingarten* Rights in Preparing Witnesses

In *McClellan AFB & AFGE, Local 1857*, 26 GERR 1531 (Oct. 13, 1988), an ALJ ruled that a telephone conference between a JAG who was defending a grievance arbitration and a witness did not trigger *Weingarten* rights because it was on the phone, there was no set agenda or prior notice, and there was no record made. A second case, where a JAG arranged for an interview with an employee in his office, did require notification. In that case, the ALJ noted the length of the interview, its location, and the fact that it had been prearranged. The case reminds us that *Weingarten* rights apply to case preparation.

The NLRB General Counsel recently reported an advisory opinion that *Weingarten* rights entitled a hispanic employee to a neutral interpreter during an investigative interview where one of his supervisors acted as interpreter. Beware of similar cases in the federal sector.

Recent Negotiability Decisions

Courts have split over the negotiability of wages. Now, *Fort Stewart Schools v. FLRA*, 1988 WL 113662, 1988 U.S. App. LEXIS 15618 (11th Cir. Nov. 21, 1988), joins 2d and 4th Circuit cases which agree with the FLRA that wages are negotiable conditions of employment. The D.C. and 3d Circuits go the other way. These 11th, 2d, and 4th Circuit cases make wages that are not fixed by statute negotiable conditions of employment. This would include section 6 schoolteachers and, potentially, NAFI employees.

In the wake of recent Army publicity about installation no-smoking policies, *NTEU and Department of Health and Human Services*, 33 FLRA 8 (1988) held that proposals to accommodate smokers were negotiable. By so holding, the FLRA reaffirmed a 1987 Army case (26 FLRA 593) that held that an Army Regulation was not a bar to negotiability.

In *Overseas Education Association v. FLRA*, 858 F.2d 769 (D.C. Cir. 1988), the court held that retiree benefits were not within the scope of bargaining. The court rejected

union proposals for space available travel for retired teachers and educational benefits for their children, relying on the FLRA decision that negotiability is dependent upon whether the proposal is about bargaining unit employees and working conditions.

The holding in *Department of Health and Human Services v. FLRA*, 858 F.2d 1278 (7th Cir. 1988), was another success for management. In that case the court rejects the FLRA's position that 5 U.S.C. § 7121 is broad enough to permit bargaining over including excepted service employees in agency grievance procedures. The case follows a 1983 case (709 F.2d 724) that excluded probationers from grievance procedures.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

Address Changes

Reserve component judge advocates receive certain publications from The Judge Advocate General's School, including *The Army Lawyer* and the *Military Law Review.* With every mailing, a number are returned because of outdated addresses. The mailing labels used to distribute these publications to *USAR* judge advocates are computer generated from a database that is maintained at the Army Reserve Personnel Center (ARPERCEN) in St. Louis. To correct or update your address and telephone number, send a short letter with the correct information to the JAGC Personnel Management Officer at ARPERCEN. Your letter should be addressed to Commander, U.S. Army Reserve Personnel Center, ATTN: DARP-OPS-JA (MAJ Kellum), 9700 Page Boulevard, St. Louis, Missouri 63132-5200. Please provide a copy of the letter to the Guard and Reserve Affairs Department at TJAGSA. *National Guard* judge advocates should continue to send address changes to The Judge Advocate General's School, U.S. Army, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. Please allow three months for the change to take effect.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1989

February 6-10: 22d Criminal Trial Advocacy Course (5F-F32).

February 13-17: 2d Program Managers' Attorneys Course (5F-F19).

February 27-March 10: 117th Contract Attorneys Course (5F-F10).

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24–August 4: 119th Contract Attorneys Course (5F–F10).

July 24–September 27: 119th Basic Course (5–27–C20).

July 31–May 18, 1990: 38th Graduate Course (5–27–C22).

August 7–11: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).

August 14–18: 13th Criminal Law New Developments Course, (5F–F35).

September 11–15: 7th Contract Claims, Litigation and Remedies Course (5F–F13).

3. Civilian Sponsored CLE Courses

April 1989

1: PLI, Law Office Management for the Solo Practitioner, San Francisco, CA.

1–8: NELI, Employment Law Briefing, Maui, HI.

2–7: NJC, Introduction to Personal Computers in Courts, Reno, NV.

2–7: NJC, Medical and Scientific Evidence, Reno, NV.

2–14: NJC, Administrative Law: Fair Hearing, Reno, NV.

3–7: SLF, Business Planning Short Course, Dallas, TX.

4–7: ESI, Competitive Proposals Contracting, San Francisco, CA.

5: IICLE, Medical Evidence, Chicago, IL.

5–6: ALIABA, Effective Counseling for Government Contractors, Washington, DC.

6: FB, Current Topics in Commercial Litigation, Miami, FL.

6: IICLE, Labor Law, Chicago, IL.

6–7: GULC, Commercial Lease Negotiation, Los Angeles, CA.

6–7: ALIABA, Immigration Law, Washington, DC.

6–7: FB, Land Use Planning, Sarasota, FL.

6–7: SBN, Federal Civil Practice Seminar, Reno, NV.

6–7: ALIABA, Employer/Employee Tort Liability, San Francisco, CA.

6–7: PLI, Cable Television Law, San Francisco, CA.

6–7: ALIABA, New Dimensions in Securities Litigation, Washington, DC.

7: FB, Current Topics in Consumer Protection Law, Miami, FL.

7: UKCL, Kentucky Estate Administration, Lexington, KY.

7: FB, Public Utilities Law Update, Tallahassee, FL.

7: NKU, Worker's Compensation, Highland Heights, KY.

7: IICLE, Third Party Practice, Chicago, IL.

7–8: ATLA, Demonstrative Evidence, Nashville, TN.

8–13: ATLA, Basic Course in Trial Advocacy, Des Moines, IA.

9–14: NJC, Alcohol and Drugs and the Courts, Reno, NV.

10–11: PLI, Current Developments in Bankruptcy and Reorganization, Chicago, IL.

12–13: IICLE, International Trade, Chicago, IL.

12–14: ABA, ERISA Basics: A Primer on ERISA Issues, New York, NY.

13: FB, Basic Evidence, Miami, FL.

13–14: SBN, Federal Civil Practice Seminar, Las Vegas, NV.

13–15: ALIABA, Labor Relations and Employment Law for Corporate Counsel and GP, New York, NY.

14: FB, Government Regulation of Land Use, Tampa, FL.

14: FB, Evidence Review and Update, Jacksonville, FL.

14: IICLE, Child Custody and Child Support, Chicago, IL.

15: PLI, Law Office Management for the Solo Practitioner, New York, NY.

17: IICLE, Appellate Practice, Chicago, IL.

17–19: GPC, Competitive Negotiation Workshop, Washington, DC.

17–21: ESI, Accounting for Costs on Government Contracts, Washington, DC.

21: IICLE, Advising Clients on Development of New Products, Chicago, IL.

21–22: UKCL, Environmental and Natural Resources, Lexington, KY.

23–28: NJC, Employment and Discrimination Cases for Courts, Reno, NV.

25–28: ESI, Operating Practices in Contract Administration, Washington, DC.

27: FB, Family Law, Miami, FL.

27–28: IICLE, Estate Planning Short Course, Chicago, IL.

27–28: ATLA, Proof of Damages, Albuquerque, NM.

27–29: PLI, Workshop on Direct and Cross Examination, San Francisco, CA.

28: FB, Current Topics in Consumer Protection Law, West Palm Beach, FL.

28: FB, Mobile Homes, Miami, FL.

28–29: ALIABA, International Human Rights, Washington, DC.

30–5/5: NJC, Judicial Writing, Reno, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1988 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Requirement

Twenty-eight states currently have a mandatory continuing legal education (MCLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7–11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	Program Description
*Alabama	MCLE Commission Alabama State Bar P.O. Box 671 Montgomery, AL 36101 (205) 269–1515	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt but must declare exemption annually. —Reporting date: on or before 31 January annually.
*Colorado	Colorado Supreme Court Board of Continuing Legal Education Dominion Plaza Building 600 17th St. Suite 520–S Denver, CO 80202 (303) 893–8094	—Active attorneys must complete 45 units of approved continuing legal education (including 2 units of legal ethics) every three years. —Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within three years. —Reporting date: 31 January annually.
Delaware	Commission of Continuing Education 831 Tatnall Street Wilmington, DE 19801 (302) 658–5856	—Active attorneys must complete 30 hours of approved continuing legal education per year. —Reporting date: on or before 31 July every other year.
Florida	Commission on Continuing Legal Education The Florida Bar 600 Apalachee Parkway Tallahassee, FL 32399 (904) 222–5286 (800) 874–0005 out-of-state	—Effective 1 January 1988. —Active attorneys must complete 30 hours of approved continuing legal education (including 2 hours of legal ethics). —Active duty military are exempt but must declare exemption during reporting period. —Reporting date: Assigned monthly deadlines, every three years.
*Georgia	Executive Director Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 (404) 527–8710	—Active attorneys must complete 12 hours of approved continuing legal education per year. Every three years each attorney must complete six hours of legal ethics. —Reporting date: 31 January annually.
*Idaho	Idaho State Bar P.O. Box 895 204 W. State Street Boise, ID 83701 (208) 342–8959	—Active attorneys must complete 30 hours of approved continuing legal education every three years. —Reporting date: 1 March every third anniversary following admission to practice.
*Indiana	Indiana Commission for CLE Program State of Indiana 1800 N. Meridian Room 511 Indianapolis, IN 46202 (317) 232–1943	—Attorneys must complete 36 hours of approved continuing legal education within a three-year period. —At least 6 hours must be completed each year. —Reporting date: 1 October annually.
*Iowa	Executive Secretary Iowa Commission of Continuing Legal Education State Capitol Des Moines, IA 50319 (515) 281–3718	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 March annually.
*Kansas	Continuing Legal Education Commission Kansas Judicial Center 301 West 10th Street Room 23–S Topeka, KS 66612–1507 (913) 357–6510	—Active attorneys must complete 10 hours of approved continuing legal education each year, and 36 hours every three years. —Reporting date: 1 July annually.

State	Local Official	Program Description
*Kentucky	Continuing Legal Education Commission Kentucky Bar Association W. Main at Kentucky River Frankfort, Kentucky 40601 (502) 564–3793	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 30 days following completion of course.
*Louisiana	Louisiana Continuing Legal Education Committee 210 O'Keefe Avenue Suite 600 New Orleans, LA 70112 (504) 566–1600	—Effective 1 January 1988. —Active attorneys must complete 15 hours of approved continuing legal education every year. —Active duty military are exempt but must declare exemption. —Reporting date: 31 January annually beginning in 1989.
*Minnesota	Executive Secretary Minnesota State Board of Continuing Legal Education 200 So. Robert Street Suit 310 St. Paul, MN 55107 (612) 297–1800	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 30 June every third year.
*Mississippi	Commission of CLE Mississippi State Bar PO Box 2168 Jackson, MS 39225–2168 (601) 948–4471	—Attorneys must complete 12 hours of approved continuing legal education each calendar year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 31 December annually.
Missouri	The Missouri Bar The Missouri Bar Center 326 Monroe Street P.O. Box 119 Jefferson City, MO 65102 (314) 635–4128	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Implementation stayed until 1 July 1988 —Reporting date: 30 June annually beginning in 1988.
*Montana	Director Montana Board of Continuing Legal Education P.O. Box 577 Helena, MT 59624 (406) 442–7660	—Active attorneys must complete 15 hours of approved continuing legal education each year. —Reporting date: 1 April annually.
*Nevada	Executive Director Board of Continuing Legal Education State of Nevada 295 Holcomb Avenue Suite 5–A Reno, NV 89502 (702) 329–4443	—Active attorneys must complete 10 hours of approved continuing legal education each year. —Reporting date: 15 January annually.
*New Mexico	State Bar of New Mexico Continuing Legal Education Commission 1117 Stanford Ave., N.E. Albuquerque, NM 87125	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 January 1988 or first full report year after date of admission to Bar.
*North Carolina	The North Carolina State Bar Board of Continuing Legal Education 208 Fayetteville Street Mall P.O. Box 25909 Raleigh, NC 27611 (919) 733–0123	—Armed Service on full-time active duty exempt, but must declare exemption. —Reporting date 31 January annually (31 March in 1989 only). —12 hours beginning in 1988.
*North Dakota	Executive Director State Bar of North Dakota P.O. Box 2136 Bismark, ND 58501 (701) 255–1404	—Active attorneys must complete 45 hours of approved continuing legal education every three years. —Reporting date: 1 February submitted in three year intervals.

State	Local Official	Program Description
*Oklahoma	Oklahoma Bar Association Director of Continuing Legal Education 1901 No. Lincoln Blvd. P.O. Box 53036 Oklahoma City, OK 73152 (405) 524–2365	—Active attorneys must complete 12 hours of approved legal education per year. —Active duty military are exempt, but must declare exemption. —Reporting date: 1 April annually, beginning in 1987.
Oregon	Oregon State Bar NCLE Administrator CLE Commission 5200 S.W. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034–0889 (503) 620–0222 1–800–452–8260	—Must complete 45 hours in a three-year period. —Starting 1 January 1988.
*South Carolina	State Bar of South Carolina P.O. Box 2138 Columbia, SC 29202 (803) 799–5578	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt, but must declare exemption. —Reporting date: 10 January annually.
*Tennessee	Commission on Continuing Legal Education Supreme Court of Tennessee Washington Square Bldg. 214 Second Avenue N. Suite 104 Nashville, TN 37201 (615) 242–6442	—Active attorneys must complete 12 hours of approved continuing legal education per year. —Active duty military attorneys are exempt. —Reporting date: 31 January.
*Texas	Texas State Bar Attention: Membership/CLE P. O. Box 12487 Capital Station Austin, TX 78711 (512) 463–1382	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: Depends on birth month.
*Vermont	Vermont Supreme Court Mandatory Continuing Legal Education Board 111 State Street Montpelier, VT 05602 (802) 828–3281	—Active attorneys must complete 10 hours of approved legal education per year. —Reporting date: 30 days following completion of course. —Attorneys must report total hours every 2 years.
*Virginia	Virginia Continuing Legal Education Board Virginia State Bar 801 East Main Street Suite 1000 Richmond, VA 23219 (804) 786–2061	—Active attorneys must complete 8 hours of approved continuing legal education per year. —Reporting date: 30 June annually beginning in 1987.
*Washington	Director of Continuing Legal Education Washington State Bar Association 500 Westin Building 2001 Sixth Avenue Seattle, WA 98121–2599 (206) 448–0433	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 31 January annually.
*West Virginia	West Virginia Mandatory Continuing Legal Education Commission E–400 State Capitol Charleston, WV 25305 (304) 346–8414	—Attorneys must complete 24 hours of approved continuing legal education every two years beginning 1 July 1988. —Reporting date: 30 June annually.

State	Local Official	Program Description
*Wisconsin	Supreme Court of Wisconsin Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Madison, WI 53703–3355 (608) 266–9760	—Active attorneys must complete 30 hours of approved continuing legal education every two years. —Reporting date: 31 December of even or odd years depending on the year of admission.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003 (307) 632–9061	—Active attorneys must complete 15 hours of approved continuing legal education per year. —Reporting date: 1 March annually.

5. Army Sponsored Continuing Legal Education Calendar (1 January 1989–30 September 1989)

The following is a schedule of Army Sponsored Continuing Legal Education not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697–3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972–6380; Trial Judiciary, (703) 756–1795; Trial Counsel Assistance Program (TCAP), (202) 756–1804; U.S. Army Trial Defense Service (TDS), (202) 756–1390; U.S. Army Claims Service, (301) 677–7804; Office of the Judge Advocate, U.S. Army Europe, & Seventh Army (POC: CPT Duncan, Heidelberg Military 8930). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: MAJ Williams, TJAGSA, (804) 972–6342.

Training	*Location*	*Date—1989*
TJAGSA On-Site	Los Angeles, CA	7–8 January
USAREUR Legal Assistance & Income Tax CLE	Ramstein AFB, Germany	9–13 January
TCAP Seminar	Fort Meade, MD	10–11 January
USAREUR Administrative Law CLE	Heidelberg, Germany	17–20 January
TJAGSA On-Site	Seattle, WA	28–29 January
3d/4th Circuits Judicial Conference	San Diego, CA	6–7 February
TJAGSA On-Site	Atlanta, GA	11–12 February
TCAP Seminar	Atlanta, GA	22–23 February
TJAGSA On-Site	Denver, CO	25–26 February
TJAGSA On-Site	Washington, D.C.	25–26 February
TJAGSA On-Site	Columbia, S.C.	11–12 March
TDS Workshop (Region III & V)	Fort Carson, CO	9–11 March
TDS Workshop (Region VII, VIII & IX)	Bad Kissengen, Germany	March
TDS Workshop (Region VI)	Yongsan, Korea	March
TCAP Seminar	Kansas City, MO	9–10 March
TJAGSA On-Site	Kansas City, MO	11–12 March
USAREUR Contract Law CLE	Heidelberg, Germany	13–17 March
TJAGSA On-Site	San Antonio, TX	18–19 March
TJAGSA On-Site	San Francisco, CA	18–19 March
TCAP Seminar	West Coast	11–12 April
TDS Workshop (Region I)	Fort Knox, KY	12–14 April
USAREUR Staff Judge Advocate CLE	Heidelberg, Germany	20–21 April
TJAGSA On-Site	Louisville, KY	22–23 April
TJAGSA On-Site	Chicago, IL	22–23 April
Basic Claims Workshop	St. Louis, MO	24–27 April
TDS Workshop (Region IV)	TBD	28–30 April
TJAGSA On-Site	New Orleans, LA	28–30 April
TDS Workshop	Fort Gordon, GA	April
TCAP Seminars (USAREUR)	Frankfurt, Germany	1–2 May
	Nuernberg, Germany	4–5 May
	Stuttgart, Germany	8–9 May
	Kaiserslautern, Germany	11–12 May
TJAGSA On-Site	Columbus, OH	6–7 May
TJAGSA On-Site	Birmingham, AL	6–7 May
TJAGSA On-Site	San Juan, P.R.	9–10 May
USAREUR International Law Trial Observer CLE	Heidelberg, Germany	11–12 May

Training	Location	Date—1989
TCAP Seminar	San Francisco, CA	May
TCAP Seminar	Fort Hood, TX	June
TCAP Seminar	West Point, NY	July
USAREUR Branch Office C.J.A. CLE	Heidelberg, Germany	4 August
USAREUR Contract Law—Procurement Fraud Advisor CLE	Heidelberg, Germany	18 August
USAREUR Staff Judge Advocate CLE	Heidelberg, Germany	24–25 August
TCAP Seminar	Fort Bragg, N.C.	August
USAREUR Legal Assistance CLE	Garmisch, Germany	5–8 September
TCAP Seminar	Fort Carson, CO	September

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, Telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/ JAGS-ADK-87-1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/ JAGS-ADK-87-2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/ JAGS-ADA-87-13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/ JAGS-ADA-87-12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
AD B116097	Legal Assistance Real Property Guide/ JAGS-ADA-87-14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS-ADA-87-5 (467 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/ JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/ JAGS-ADA-87-9 (121 pgs).

AD B124120 *Model Tax Assistance Program/ JAGS–ADA–88–2 (65 pgs).

AD B124194 *1988 Legal Assistance Update/ JAGS–ADA–88–1

Claims

AD B108054 Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842 Environmental Law/JAGS–ADA–84–5 (176 pgs).

AD B087849 AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).

AD B087848 Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).

AD B100235 Government Information Practices/ JAGS–ADA–86–2 (345 pgs).

AD B100251 Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).

AD B108016 Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).

AD B107990 Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).

AD B100675 Practical Exercises in Administrative and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

AD A199644 *The Staff Judge Advocate Officer Manager's Handbook/ACIL–ST–290.

Labor Law

AD B087845 Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).

AD B087846 Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999 Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).

AD B124193 *Military Citation/JAGS–DD–88–1 (37 pgs.)

Criminal Law

AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).

AD B100212 Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 70–1	Systems Acquisition Policy and Procedures		10 Oct 88
AR 350–9	Overseas Deployment Training		20 Oct 88
AR 350–42	Nuclear, Biological, and Chemical Defense and Chemical Warfare Training		14 Oct 88
AR 600–85	Alcohol and Drug Abuse Prevention and Control Program		21 Oct 88
AR 700–129	Management and Execution of Intergrated Logistics Support (ILS) Program		23 Sep 88
AR 725–50	Requisitioning, Receipt, and Issue System		3 Oct 88
AR 420–10	Facilities Engineering		30 Sep 88
CIR 611–88–32	Project Development Identifiers		20 Oct 88
CTA 50–970	Expendable/Durable Items		30 Nov 88
Pam 600–24	Suicide Prevention and Psychological Autopsy		30 Sep 88
Pam 600–45	Army Communities of Excellence		Oct 88
Pam 690–14	Position Management Classification		14 Oct 88
	Personnel Evaluations Handbook/Issue 5	I01	26 Oct 88

3. The following civilian law review articles may be of use to judge advocates.

Albertson, *Rules of Professional Conduct for the Naval Judge Advocate*, 35 Fed. B. News & J. 334 (1988).

Cross and Griffin, *A Right of Press Access to United States Military Operations*, 21 Suffolk U.L. Rev. 989 (1987).

Lacy, *Whither the All-Volunteer Force?*, 5 Yale L. & Pol'y Rev. 38 (1986).

Wiener, *Persuading the Supreme Court to Reverse Itself: Reid v. Covert*, 14 Litigation 6 (1988).

Note, *Constitutional Law, Goldman v. Weinberger: Circumscribing the First Amendment Rights of Military Personnel*, 30 Ariz. L. Rev. 349 (1988).

Note, *Intramilitary Tort Immunity: A Constitutional Justification*, 15 Pepperdine L. Rev. 623 (1988).

Note, *Solorio v. United States: A Return to the Unrestrained Subject Matter Jurisdiction of Military Courts*, 66 N.C.L. Rev. 1023 (1988).

Note, *United States v. Stanley: Has the Supreme Court Gone a Step Too Far?*, 90 W. Va. L. Rev. 473 (1987/1988).

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By Order of the Secretary of the Army:

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General, United States Army
Chief of Staff

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